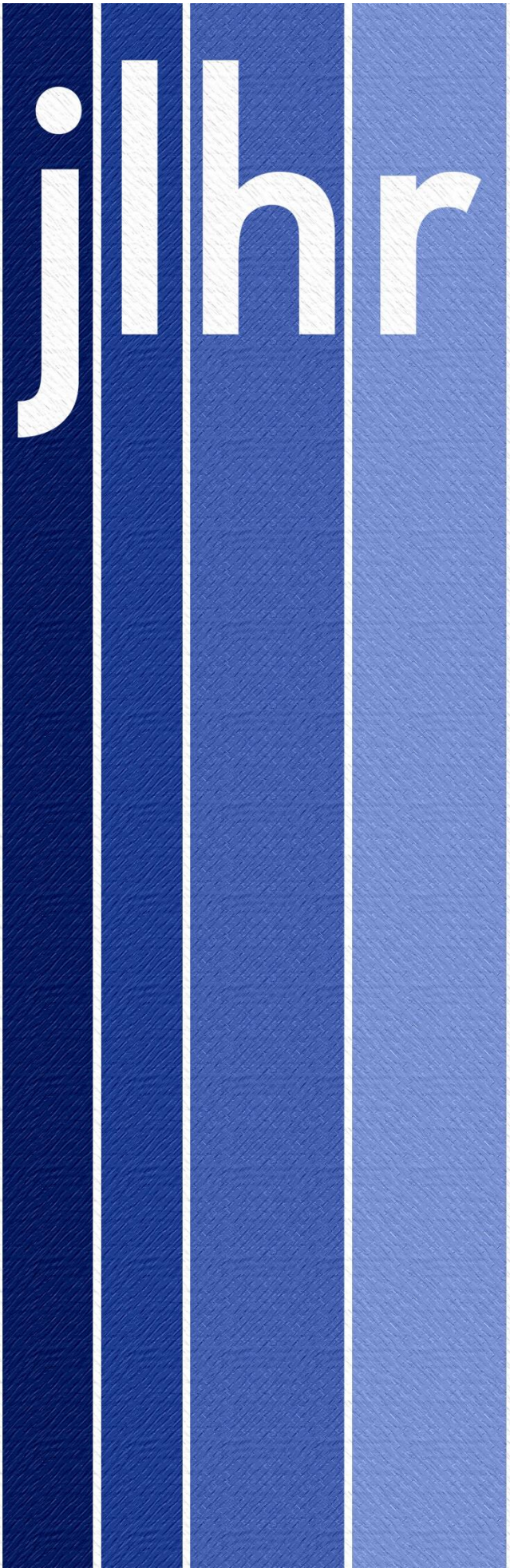

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Jindal Law and Humanities Review

Editorial Board

jlhr

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FOREWORD

*Mani Shekhar Singh**

It is a proud moment to be part of the birth of the inaugural volume of *Jindal Law and Humanities Review,* the first interdisciplinary law journal of its kind in the country, initiated and imagined by a group of extremely talented and creative student editors.

I remember fondly the conversations in the sociology classes which led to the idea of starting this student journal. For their class assignments, the students had done stunning empirical research based on participant-observation fieldwork. Their research projects also resulted in some of them publishing their findings. We talked about how the doing of "law by other means," to borrow from Peter Goodrich, is a necessary condition to thinking through the nature of law, and its entanglement with social science and humanities. And how a student-led journal would provide a creative and unconventional space for this *doing of law by other means*. The journal in its conceptualization challenges the artificial distinction between "law" and "non-law" by putting law on "speaking terms," to invoke James Clifford, with social science and humanities. It imagines cross-disciplinary dialogues and border crossing so as to facilitate a more productive conversation between legal research and scholarship, and social science research.

This moment is particularly inspiring to me as a sociologist teaching in a law school. I am most honoured to have been in conversation with my students from the beginnings of this idea to the inaugural issue. I have been deeply impressed by the creativity, hard work, and initiative of the editors, especially their attention to the proliferation of issues, debates, and modes of writing. The inaugural issue reflects their desire to think afresh and launch a journal with a difference—one which takes modes of conversation, dialogue, and border crossing seriously.

Talking about law today is one of the most important aspects of the social, yet cross-disciplinary perspective and form is something that has not been experimented with enough. *Jindal Law and Humanities Review* is undoubtedly path breaking. Its future holds great promise for serious interdisciplinary engagement with law. It is my hope that scholars, researchers, and students will support this endeavour with a keenness and urgency that coincides with the times we live in, soliciting academic freedom, reflexivity, and creativity.

* Mani Shekhar Singh is Associate Professor, Jindal Global Law School and Executive Director, Centre for Law and Humanities, OP Jindal Global University. He also serves on the Advisory Board of *Jindal Law and Humanities Review*.

EDITORIAL*

Dikshit Sarma Bhagabati, Neeta Maria Stephen, Malini Chidambaram**

Oh, *JLHR*! Of our Feral Hearts and Murdered Inks

Dikshit Sarma Bhagabati

Back in 1936, frustrated with the lifeless and quotidian routines of law review publications, Fred Rodell declared aghast: "there are two things wrong with almost all legal writing. One is its style. The other is its content. That, I think, about covers the ground."[1] Two decades later Barthes echoed from across the Atlantic that style, as a "blind force" in writing, is situated at the cusp of temporal biographical nature and the beyond of grammatical norms where the writer's formal identity can be established.[2] Style archives the writer's personal history, acting as a metaphor for her literary preferences without even "signifying a choice". What choice does legal writing ever

* We write this editorial by preserving our individual voices not as an egoistic fruition of the editorial process, but to lay bare the irreconcilable yet complementing singularities of our styles, visions, and nuanced political positions. Even though the three of us might be hinting at similar issues, we hope that the different epistemological and experiential standpoints which overwrite these familiar motifs reveal the journal's wish to rethink the familiar in uncharted ways. The many circularities, repetitions, and implicit conversational allusions within this narrative derive from the aporetical logjams of the editorial process itself. Perhaps we can hope to vindicate this dispersed Editorial—but not its attendant privilege—by agreeing that it is as murky, desolate, and circumspective as the rigours of producing a journal can be. Yet, it discloses the challenges we have grappled with, and the challenges we must still forebear to realize *JLHR's* cherished vision.

** While we sign the Editorial with our names, the effort of producing this journal has been a collective enterprise. We owe an enduring debt to the Board of Advisors for their constant guidance, support, provocations and, most importantly, for acquainting us with the ramifications and possibilities which had escaped our sight. Our contributors, overwhelmed with their own challenging schedules amidst the covid-19 pandemic, continued working with us to curate this issue. We are very grateful for the individualized and dedicated collaboration provided by each of our contributors. The University Administration at OP Jindal Global University has been generous with institutional support and personal encouragement. We owe our deepest gratitude to the Vice Chancellor and Executive Dean, JGLS. The IT team at the University has invested long hours of labour to develop a brilliant website. Being quite technologically inadequate, perhaps we will never understand the full extent of their help. Finally, try as we may to read the efforts of our fellow editors in shaping this issue, we can never fully express the collective student-led initiative of *JLHR* in mere words of thanks. We, therefore, write this Editorial upon the limitedness of our own contributions amidst the cumulative labour that has materialized this journal.

[1] Fred Rodell, 'Goodbye to Law Reviews' (1936) 23 Virginia Law Review 38, 38.

[2] Roland Barthes, *Writing Degree Zero* (Beacon Press 1970) 13-14.

present except its deadness and stuckness? If style is indeed a metaphor for the history inscribed in the writer, almost as indelibly as the natural constitution of her body, then perhaps legal writing does represent the incisive juridico-deductive logic that law usurps to seal its semantic closure. Perhaps legal writing does serve its ends: that is—borrowing from Nietzsche's famous *Ten Rules*—to suit the person with whom the enunciator is communicating. Judges writing for lawyers, lawyers writing for clerks and judges, scholars writing for whoever would care to read, and parties reading their fates imprinted on legal papers but rarely writing much—one legal actor for another, that is the communicative circuit of legal writing.

Jindal Law and Humanities Review, therefore, emerges with an elementary understanding that the familiar signs of legal writing, those permeating the neoliberal classroom where we are located, have to be ventriloquized with a rebellious *mode of writing*. Precisely, a *mode of writing*; not some pathbreaking style, content, or even language. But a mode of writing (again, *à la* Barthes) that speaks to the solidarities forged in the renegade traditions of legal academia—and also in the anthropological, historical, literary, psychoanalytical, and the other humanities discourses which are deliberately ostracized under the inclusively excluded mark of interdisciplinarity. We are aware of the banality in what we are doing, the usualness dictating this venture that we are tempted to call unprecedented. The fabled celebration of writing as freedom is a premium on the act of expression that can never fully be redeemed. It is a moment crystallised in its after-image[3] and rendered dead in hallowed epistemic chambers. Law and Humanities, Socio-Legal Studies, Critical Legal Studies—these are some of our self-proclaimed inheritances. The erudition of these disciplines comes equipped with distinct vocabularies, argumentations, figureheads, standard forms, and channels of dissemination. Thus isn't the kind of writing passed down through these modes always already dead, even before the taste of this break we are feigning turns sour in our mouths?

The point of *JLHR* is not to pretend being alive when death itself—following Nietzsche—can be lived as freedom,[4] as an affirmation of life that is anyway ordained to be dead after the initial moment of divergence. We will, bound by this inevitable death, take leave of life as a virtue in writing. At the same time, *JLHR*—more so, the process of producing and sustaining it—must not offset the humility of our constrains and the jubilation of our solidarities with a fragile moral authority. Our provincial position in critical scholarship should not become complacent with the dead-ends of current resistance. We wish not to inflict a mummifying murder on ourselves by preaching about death and the rigours of existence.[5] The modest motive of this venture is to curate a journal that revels in its praxes while being mindful of the political, social,

[3] ibid 17.

[4] Friedrich Nietzsche, *Thus Spoke Zarathustra* (Adrian Del Caro and Robert B Pippin eds, Adrian Del Caro tr, Cambridge University Press 2006) 53-55.

[5] ibid 31-33.

and literary responsibilities of our mode of writing. And through this feeling of confusion—as Neeta writes in her editorial, the desperation of "not knowing what to do"—*JLHR* will reach out to a future anteriority where all our protests and scholarships will have come together in solidarity by harnessing the present chaos.

What exactly is our mode of writing?—one must wonder, for wondering itself is the solution. We do not definitively know where our allegiances lie. Certainly, the name *Jindal Law and Humanities Review* is not a shorthand for the type of content we cherish. It is a proper name that rigidly designates itself, a Lacanian pure signifier that points to itself and quilts the names of the disciplines we wish to interact with. Anthropology, literature, history, philosophy, and many more signifiers of scholarly discourses stabilize around the master signifier *JLHR* but are not signified by it. And this emptiness, the constitutive lack of a signified, is our vitalizing force. It empowers us to organize an apocryphal enterprise of research and creativity in the name of *JLHR*, without remaining chained to the politics of disciplinary fidelities. We are not quite concerned about whether we are branching out of law or plunging into it from the humanities. In the pedantic regulation of form and content which is characteristic of journals, we are unsure about stylesheets and intend to collaboratively work on shaping pieces that match our logistical limitations with authorial intent. In fact, blurring the dichotomy of form and content might unfurl the emancipatory possibilities of writing. Let's overstep this drab divide and, in the spirit of Benjamin,[6] focus on the political tendencies inherent in the technique of production. Here the author becomes a producer and participates in the struggle for epistemic justice waged by the innumerable repressed subjectivities of the dominant ideological worldviews that interpellate us all as readers and writers.

Yet, the recovery of oppressed knowledge invariably leaves behind a still-to-be-recovered residue. In this postcolonial aftermath of the South, reeling under the structural violence of militant-managerial states, reproducing itself constantly as many deterritorialized Souths and many phantasmagoric[7] worldings of our Third World, the struggle for knowledge itself produces a paranoiac knowledge of resistance that will seldom be. The knowledge we yearn to enliven through our writings is wedded to its impossibility by the grind of time. It is a hope charred by the elusive goals of an Arab Spring that democratizes dictators for dictatorship, by a BLM movement appended to elite presidential campaigns, by a caste liberation trapped between its resilient birth and the thousand dooms of twice-born legal liberalism.

Boaventura de Sousa Santos is correct in urging that the epistemologies of the South have to proceed on a sociology of absence that turns absent subjects into present

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[6] Walter Benjamin, 'The Author as Producer', *Selected Writings, Vol 2, Part 2: 1931-34* (Harvard University Press 2005).

[7] *See* Anthony Giddens, *The Consequences of Modernity* (Polity Press 1990) 99.

identities.[8] Half-formed identities too must continue struggling for substantive self-representation. But what about the presence of absence in these very identities, the inseparable (Derridean) trace of their absent others?[9] More nuancedly, aren't we all suspended in the implacable postponement of presence that intervenes in a thing as what it is not, as the collapse of the binary between presence and absence? This is where we hit a roadblock in pondering diversity. For instance, in every critique of queer intimacy haunted by the spectre of *Navtej Singh Johar's*[10] deficiencies, there is a recurrent exclusion within the recovered absences as well. Dalit and Adivasi queers did not feature in the justice-situation articulated by the Supreme Court, and so are their responses secondary to both the judgment's celebrations and the mainstream critiques of the Court's views on privacy, dignity, and criminality. How many women will make up a genuinely diverse Advisory Board? How many times must we intersect intersectional identities to create a list of contributors that vindicates the privileged space from which the journal operates? When will the quantitative indicators of diversity be generative of qualitative equity and justice? Are these—if I may be permitted to use the Derridean jargon once more—attainments deferred forever in *différance*?

A commitment to justice, nevertheless, must not be abjured in disillusionment. After all, it ought to be the indeconstructible guide of hermeneutics and legal activism.[11] As Kennedy observes, just about every professor in the legal classroom has an idea of social justice—some "progressive", some "conservative", and some downright unjust.[12] The university-sanctuaries which train the labour for this journal are similarly imbued with a vogue justice-speak. It is only when we are compelled to translate our vision into concrete matrices that the check posts of representative diversity school us on our shortfalls. What this underscores is an incurable discomfort that cannot be allayed so long as structural malaise exists. Yet the structure is not an apology for our failures but a contingent site of subversion. The proto-fascist, capitalistic, and now diseased[13] clamp down on progressive resistances demands organization here and now for the sake of a courageous future that will have come, a juncture of tomorrow without any definitive telos which will have instituted today's uncertainties. Perhaps this is an underlying theme throughout the Issue.

James Parker, in providing an epigrammatic lexicon of law and listening, hints at a cross-cultural acoustic engagement with legal closures. Upendra Baxi wrote his

[8] Boaventura de Sousa Santos, *The End of Cognitive Empire: The Coming of Age of Epistemologies of the South* (Durham University Press 2018) 2.
[9] Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, JHU Press 2016).
[10] (2018) 10 SCC 1.
[11] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"', *Deconstruction and the Possibility of Justice* (Routledge 1992).
[12] Duncan Kennedy, 'The Social Justice Element in Legal Education in the United States' (2005) 1 Unbound 93.
[13] Malini illuminates the diseased pathos of our times incisively in the upcoming section.

article on the *Milirrpum* verdict back in the 1970s, but we are reading this account of indigenous resilience today. By prefacing it against the backdrop of the current BLM protests, he encourages us to remain hopeful that what will have remained, and should remain, after all discontent—today, tomorrow, and thereafter—is the movement for justice. Ather Zia, in her essay, underlines how the pandemic has doubly imprisoned the post-370 Kashmir. But every repressed longing for Kashmiri self-determination is a postponed rupture. Her parents, for instance, could not complete their seven days of pilgrimage when the lockdown was abruptly imposed in August 2019, but we know that they surely will. Dhiren Borisa highlights how the queer movement must move beyond its caste ignorance. The Book Review Symposium on *Confessions of the Fox* reflects a multitude of readerly and writerly voices that make and unmake the anti/novel, even as we read the reviews by Oishik Sircar, Shals Mahajan, Rahul Rao and the response by Jordy Rosenberg. Our conversations with Arundhati Roy and Dolly Kikon revolve around the vagaries of life and death in marginal spaces, be it the Jannat Guesthouse in Old Delhi or the forests of North East India. The Pandemic Diary entries by Vasuki Nesiah and Teesta Setalvad emphasize the importance of protests during the pandemic—through its pathos, in spite and because of it. Danish Sheikh's play resonates direct voices of queer intimacy which ponder how things do not change even if "things can change"—and vice versa. In the end, Gnanavi Gummadi's cartoons demonstrate how law's linguistic conceit can be made to tolerate pictorial forms. Such diverse content, but we still question if it is diverse enough.

Roxane Gay very astutely notes her frustration with diversity becoming a triumph of tokenistic participation.[14] There is such a maddening push for diversity all around us that the experiences of historically subjugated communities matter little to these ostensibly representative spaces. We must therefore be cognizant of our failed attempt at putting together a more diverse Board and Issue. Amidst the electronic blots of typeset ink, we know there is the invisible script of numerous unrequited invitations to serve on the Advisory Board and an equally disquieting number of incomplete, pulled-out contributions. Our claim to diversity—not that we make one—is not that we tried and failed. It is not the case that there aren't enough Dalit scholars, Muslim writers, or women lawyers to carve out a numerically balanced Board. Rather, the key is to shift registers from a calculable achievement of diversity to a labour of love and empathy that cares to support equitable epistemological standpoints and strives to bring out the subaltern intertextualities of the journal. There is no doubt that we live in shiny glass houses distant from the journal's aspirations. This wedge, however, places us squarely within our privilege while propelling the text on an ever-transient flight to greater inclusivity. We are just one venture in this corporate-academic-statist flux of

[14] Roxane Gay, *Bad Feminist: Essays* (Harper Collins 2014); Roxane, 'The Full Text of "Bad Feminist" Author Roxane Gay's WI12 Speech' (*PublishersWeekly.com*) <https://www.publishersweekly.com/pw/by-topic/industry-news/bookselling/article/72649-the-full-text-of-bad-feminist-author-roxane-gay-s-wi12-speech.html> accessed 16 September 2020.

social justice; but ours is still a struggle for justice and alliances through whatever mode of writing the proper name *JLHR* might come to incubate.

So we begin here; at a moment which endeavours to erase its originary markings of rupture, life, revolution, and every other word that betrays the sombre mood of having created a poem never to be published, an artwork to be ashamed of, an essay to comfort the incomprehensibility of our thoughts, or just an editorial that presages nothing big. Ours is truly a project in minor architecture.[15] *JLHR* is not an exploration of some uncharted territory but an attempt to inhabit the humdrum of our known spaces afresh and anew. We are not foreclosing radical change but setting ourselves up to begin the act of subversion from immediacies. In a sense, *JLHR* does not downplay "revolutionary ideas" but notices them in the fraying milestones littering the grand broadways of collective epochal insurrections. This is about a Dalit queer who isn't invited to posh parties and an eighteenth-century jailbreaker who has suddenly come out as a trans man from the oxidized pages of history. We have a sense of where the pandemic has led us and what the abrogation of Article 370 has unleashed in Kashmir, yet we must listen to these episodes from those on the field. Like an unpublished article, noises on the streets, or the umpteenth draft of a play, you have always known *JLHR*. We are just finally presenting it to you. It is something, and let's leave it at that.

Of Cartographies and Liminalities

Neeta Maria Stephen

The cartographic metaphor employed in the title of John Austin's *Province of Jurisprudence Determined* to allude to legal positivism's task of demarcating the province of law from the non-law surged into memory with the ink settling on our digital typeset. Reassured by a commitment to adopt and practice a contrary conception of knowledge beyond these formalistic distinctions, we perceived our efforts as a transgression of these disciplinary confines. However, an endeavour to preface this issue with ruminations on interdisciplinary methodology muddled our disavowal of the demarcation of disciplines and the attendant practice of gatekeeping.[16] A traverse of interdisciplinary methodology would reinstate older limits while hedging in new perimeters through an attempt to efface the old, resurrecting the position and the practice of the cartographer. Archana Parashar observes this paradox; alternate propositions and narratives from defined positions have their own closures and

[15] Jill Stoner, *Toward a Minor Architecture* (MIT Press 2012).

[16] This was a provocation made by Professor Oishik Sircar during our conversation regarding the tagline *Transgressing the Province of Jurisprudence* for our social media accounts. The paradox, posed by him, of challenging boundaries while reinforcing and creating new boundaries prodded an introspection of my framework of departures and resistances.

exclusions.[17] Newer cartographies replace the old. We cannot and do not aim to chart out these cartographies; rather we negotiate in our liminal spaces.

Bereft of determined semantics, we draw on our dissonances to operate within our defined positions. Inhabiting the paradoxes and discords in the interstices of our engagements and disengagements with law and knowledge production—a practice neither recent nor unprecedented—is what inspires our efforts.

Our embeddedness in social, historical, and political epistemic sites[18] requires us to dwell on our ethical and political practices of care and responsibility that are intertwined with and integral to our pursuits. To absolve ourselves of our privileged positions in a liberal private university by simply restraining our vantage points from appropriating the concomitant "other", is to abdicate our responsibility by inhabiting a conceptual shelter without ramifications.[19] The unsettling concern of the diversity of narratives, conceptions, and concerns in our efforts of curating this issue necessitates an earnest responsibility beyond the tokenistic accommodation of diversity in our Advisory and Editorial Boards. Audre Lorde's incisive critique of the defence of not knowing whom to ask reminds us of our responsibility to educate ourselves,[20] a responsibility we cannot claim to have discharged in this issue or discharge in our future undertakings. This responsibility defies transience.

As we tread the contours of our ethical and political liminalities of research, we are grateful for the collective support and care that our contributors, advisory board, peer reviewers, and fellow editors have kindly offered throughout this endeavour.

Pandemic, Polarity, and Production

Malini Chidambaram

"*I'm so sorry that I haven't been able to get the revisions to you yet. I'm really struggling with workload and other pressures and commitments at the moment. Just…entered one of the strictest and most heavily policed lockdown regimes in the world, the…plans to cut 450 jobs, which means that in addition to everything else an awful lot of my time is now being taken up with industrial relations. As a result, I've barely been able to look at the piece since you were last in touch and I'm not sure when I will find the time. Please, if you need to proceed with the issue without me, feel free to do so. Otherwise, I will keep you posted as best I can on my progress. With thanks and apologies…*"

[17] Archana Parashar, 'Exclusions and the Voices of the Excluded' (2000) 25 Australian Journal of Legal Philosophy 323, 326.
[18] Margaret Davies, 'Ethics and Methodology in Legal Theory: A (personal) Research Anti-Manifesto' (2002) 6 Law Text Culture 7.
[19] Parashar (n 2) 332.
[20] Audre Lorde, 'The Master's Tools Will Never Dismantle the Master's House' in *Sister Outsider: Essays and Speeches* (Crossing Press 2007) 110-114.

"*Dear Editors, My semester started and it's a mess of online scheduling this year.*"

"*My sincere apologies again. It's been such an insane time here. As I'm sure it is there.*"

"*I hope you are hanging in there ok these days.*"

"*I wish we had a frame of reference as to how to deal with this, being locked up inside, it's just horrible having to figure it out on your own.*"

"*Dear Malini, Dikshit, and Neeta, I hope you all are safe and healthy. These are trying times indeed. Our teaching and admin work has moved online and it seems things are not yet falling in line. If possible with you I would like to request my contribution be rescheduled for the next issue rather than this one. I am not happy making this request but I also do not want to push for longer deadlines which seem would become the case given how we are grappling with the mounting work for the rest of the semester. I hope you understand. Please let me know what you think? Thanks a lot.*"

"*I am with my grandmother who has contacted covid. She lives alone and I am the only one with her taking care of her right now.*"

"*I'm just confused and tired.*"

"*Dear Everyone, My sincerest apologies for this delay. Your email had been on my mind since you sent it yet in the firefighting around this pandemic and the callous state, everything not "very very urgent" had to be delayed. So three weeks later, I am writing to say I would be honoured to send you a piece…*"

"*Hope you and you loved ones are well and staying safe (these ordinary words seem to have taken on a completely different valence in these times). Glad to see that the work on the journal is progressing well, which is important.*"[21]

It is very exciting in many ways as an editor[22] to see a sanitized or final(?) product, in the form of the first issue of *Jindal Law and Humanities Review* (JLHR). In my gaze, it has evident traces of the work, ideas, emotions, sentiments, disagreements, ethics, commitments, and compromises of many persons who have given *JLHR* their time and energy over the last two years of conceptualizing, institutionalizing, and producing the journal. But little did we, as a team, anticipate, as most of the world might feel about their own experiences, that the last and some of the very important

[21] These are a few excepts from the email exchanges with contributors and then potential contributors, advisors, and editors during the pandemic production of the inaugural issue of *JLHR*.

[22] The provocation to think about this Editorial and many, many other aspects of *JLHR* was provided by Prof Oishik Sircar, either in our meetings or through his provocative and perfectly curated lectures. As law students we are often told that to write in first person is unacademic in legal research and writing. Much of that deeply ingrained negative significance that I had attached to writing in first person and using the "I" was unlearned through Prof Oishik Sircar's provocation in our Jurisprudence I and II courses at Jindal Global Law School.

bits of this work would have to be in these new and disorienting circumstances, amidst a global pandemic. Even as I say this, it is important for me to acknowledge that there are many more around the world for whom everyday, as it is intimately practised currently, is a negotiation with the state, with the society, with survival, and with oneself.

I cannot deny or ignore this recurring feeling while producing this issue in the times of Covid-19 that there is some deep violence in our editorial work. The pandemic seems to produce this troubling duality in all of our experiences; the new (ab)normal and the new normal. There is a constant dichotomy, a need to find or disguise a new normal while simultaneously existing with a reality that is anormal and even often difficult and disquieting. This polarity is evident from the excerpts quoted above from some of the conversations and the general sense of things we have encountered in the last few months of work during the pandemic. At a time when we were rethinking the ideas of coercive deadlines and grappling with the anormal, we were also working with the transient hopes of circumventing the anormal, to carry on as if all things were normal or as normal as the new normal may allow.

Working remotely also posed new challenges for our organizational coordination. For a student-run journal working together for its inaugural issue, with no familiar blueprint to follow, operating in the pandemic presented renewed challenges. *JLHR* is a law review conceptualized with an ambitious theoretical heft that hopes not just to tend carefully and rigorously to aspects well beyond the tangible production of an issue or volume, but also engage and grapple with the process and means of production as an ethical and self-reflective practice. Collectively learning/and expending this labour of critique[23] was to confront the received ideas of organizational and intellectual hierarchy in the interactions between the "teacher" and the "taught", the learner and the learned and, equally important yet often overlooked, among students.[24] As my fellow editor has remarked in her editorial, we indeed cannot assert definitively to have discharged this responsibility that defies transience. But I hope *JLHR* has and will continue to be a work in progress with regards to this learning and responsibility and will keep on engaging with our numerous failures and shortcomings.

It is in this vein that I engage with this pandemic production and our many other failures as editors. As I acknowledge this violent production and the privilege of being able to work, I am drawn to remember Vasuki Nesiah and Teesta Setalvad's incredibly pensive and brilliant writings enclosed in this issue, touching upon the Black Lives Matter protests and the Migrant Workers' Crisis respectively, highlighting the

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[23] Wendy Brown and Janet Halley, 'Introduction' in Wendy Brown and Janet Halley (eds), *Left Legalism/ Left Critique* (Duke University Press 2002).

[24] Upendra Baxi, 'Teaching as Provocation' in Amrik Singh (ed), *On Being a Teacher* (Konark Publishers 1991).

importance of writing, creating, and working (when you can, physically and emotionally) amidst Covid-19 and its attendant guilt.[25]

"*Even as we protest, we carry (already old) anxieties about COVID, alongside new anxieties about tear gas and arrests, deportations and travel restrictions.*"

"*What now? Will urban India choose again to slumber and forget? The mass exodus was called shameful, shocking, and worse and more than what India had encountered during Partition. What will be the lessons that will stay and we will learn?*"

With this in mind, I would like to extend my sincerest and apologetic thanks and congratulations to all the contributors, reviewers, student editors, advisory board members, and well-wishers of JLHR for allowing us their work, support, and thoughts in these trying times. I cautiously hope that this issue and all future works of *JLHR* to come will make a modest attempt at challenging the theoretical, juridico-legal, and social gatekeeping of knowledge, protest, and work in the realms of the pandemic and the academic. At the heart of *JLHR* is a provocation to reimagine the pedantic and futile categorization of academic publications and research into the legal and academic vs the radically interdisciplinary and aesthetic; for the two are not mutually exclusive and can be created and curated with equal academic labour and rigour (or not), beyond the conventional imagination of legal academic works.

[25] 'Pandemic Diary' (2020) 1 JLHR 140.

ARTICLES

A Lexicon of Law and Listening

James Parker

The Dreaming, Never to be Lost: A Critique of the Gove Land Rights Decision

Upendra Baxi

A LEXICON OF LAW AND LISTENING

*James Parker**

Ahem: Before we Begin

There is something satisfying about the alphabet: about alphabetization, and so dictionaries and lexicons. They feel complete. There is a sense of coverage and of order. This is a fantasy of course. But it is one into which we are inducted from our very earliest encounters with the world of writing and so also, in a manner of speaking, of law.[1] How strange that, so often, the medium of this induction is the voice: that we learn to read by listening. Law's textuality has been systematically overstated. Even texts sing. And if there is a more familiar refrain in the English language than the "Alphabet Song", I would be surprised. As a way into thinking about, or arranging thinking about, the relationship between law and listening, therefore, the lexicon is quite suggestive. It offers a roadmap that is at once arbitrary and entirely governed by the strange logic of the "phonotext".[2]

There is a long history of allowing one's thought to be governed and extended like this. The immediate inspirations for this lexicon were two books from the field of Sound Studies: Stephen Connor's *Beyond Words: Sobs, Hums, Stutters and Other Vocalizations* (2014) and Brandon LaBelle's *Lexicon of the Mouth* (2014), both organized not-quite alphabetically, both concerned with cataloguing and understanding a series of not-quite linguistic vocalizations: coughs, growls, hisses and hums; in Connor's case from "ahem" to "zzzz".[3] But I also had in mind Teju Cole's hilarious and penetrating series of alphabetized tweets, beginning on 26 August 2013: "a modern-day glossary

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[1] See for instance, Peter Goodrich, *Languages of Law: From Logics of Memory to Nomadic Masks* (Weidenfeld and Nicolson 1990).

[2] Garrett Stewart, *Reading Voices: Literature and the Phonotext* (University of California Press 1990).

[3] Jonathan Sterne (ed), *The Sound Studies Reader* (Routledge 2012); Trevor Pinch and Karin Bijsterveld (eds), *The Oxford Handbook of Sound Studies* (Oxford University Press 2012); Michele Hilmes, 'Is There a Field Called Sound Culture Studies? And Does It Matter?' (2005) 57(1) American Quarterly 249, 249; Steven Connor, *Beyond Words: Sobs, Hums, Stutters and Other Vocalizations* (Reaktion Books 2014); Brandon LaBelle, *Lexicon of the Mouth* (Bloomsbury 2014).

of received wisdom", which Cole set out to skewer in 140 characters or less.[4] Some examples:

> AUSTRALIANS. Extremely fit. Immune to pain. If you meet one, say "Foster's." The whole country is nothing but beaches. CRIME. Illegal activities involving smaller amounts of money. JAZZ. America's classical music. The last album was released in 1965. SMART. Any essay that confirms your prejudices. TELEVISION. Much improved. Better than novels. If someone says "The Wire," say "The Sopranos," or vice versa. ŽIŽEK. Observe he's made some good points, but.[5]

As Cole would later explain, the whole thing was a contemporary riff on Gustave Flaubert's *Dictionnaire des Idées Reçues* (1913) ("Dictionary of Received Ideas"), as well as Ambrose Bierce's more cynical *Devil's Dictionary* (1906). But I thought immediately of OULIPO, the circle of writers and mathematicians founded by Raymond Queneau in France in 1960 with a view to exploring the literary potentials of formal constraints. Thus, Queneau's *Cent Mille Milliards de Poèmes* (1961) ("*Hundred Thousand Billion Poems*"), comprising 140 lines of rhyming sonnet to be arranged by the reader in any order, or Georges Perec's famous lipogram *La Disparition* (1969) ("A Void"), which does not include the letter "e".[6] Though infinitely (or at least a hundred thousand billion times) more modest, this lexicon is also a literary experiment of sorts. Its formal conceit – one entry for every letter of the English-Latin alphabet – is also an engine of jurisprudential production; an exercise, you might say, in "jurisography".[7]

Another obvious reference point in the history of legal writing is the law dictionary – extending back through Butterworths' (1997-present) to Black's (1891-present), Jacob's (1729) and beyond – though this text makes no claim to be either comprehensive or authoritative. Just the opposite actually. What follows is intended as an opening outward, an invitation to other jurists and sonic thinkers. I hope the reader will quickly see the lexicon's conceit for what it is: that insofar as this text gathers a vocabulary and set of themes and methods for thinking the many relationships between law and listening, any initial sense of coverage or completeness soon gives way to the realization that each and every entry might equally have been another. From A to Z and beyond, there is a whole world of alternatives. Indeed, this lexicon is written in only one alphabet, in just one language, and in a specifically British-Australian idiom

[4] 'Teju Cole's Dictionary of Received Wisdom – What Would You Add?', *The Guardian* (27 August 2013) <https://www.theguardian.com/commentisfree/2013/aug/27/teju-cole-modern-glossary#comment-26387013>.

[5] Teju Cole, 'In Place of Thought', *New Yorker* (27 August 2013) <https://www.newyorker.com/books/page-turner/in-place-of-thought>.

[6] Warren F. Motte (ed), *Oulipo: A Primer of Potential Literature* (Lincoln: University of Nebraska Press 1986).

[7] Ann Genovese and Shaun McVeigh, 'Nineteen Eighty Three: A Jurisographic Report on Commonwealth v Tasmania' (2015) 24(1) Griffith Law Review 58; Ann Genovese, Shaun McVeigh and Peter D Rush, 'Lives Lived with Law' (2016) 20 Law Text Culture 1.

at that. It was written on unceded Wurrundjeri land, in the settler colony of Australia, from the perspective of someone trained in, amongst other things, the common law. I hope there is something of general interest here, but more than anything this is a (neatly alphabetized) archive of my own jurisprudential pre-occupations and prejudices.

This is not my first attempt to think law and listening together. One of the things I want to do here is make "usable" the ideas I have developed elsewhere, precisely by untethering them from their original contexts and allowing them a certain room to breathe. My book *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (2015) emphasised depth over breadth. It tried to elaborate a specifically acoustic jurisprudence by staying with the details of just one case, in just one jurisdiction: the trial – by the International Criminal Tribunal for Rwanda – of a singer, accused of inciting genocide with his songs.[8] The book's depth, I hope, was its strength. This lexicon is very different. It offers "shallow listening" as a virtue instead.[9] In addition to excising examples developed elsewhere, it follows through on thoughts I have not had an opportunity to pursue at greater length, or which have been developed already in other fields but warrant further jurisprudential elaboration. It can also be read, therefore, as a series of veins to be further mined and explored.

So with that throat clearing out of the way…

***

A is for acoustic, from the Greek *akoustikos*, "pertaining to hearing or listening". In contemporary usage, we often talk about the acoustic of a space or building: a church, an office, a courtroom. In this way of thinking, the acoustic has to do with ears, subjectivities, and institutions. It is, you might say, anthropocentric. But *A* is also for acoustics, the branch of physics concerned with the "generation, transmission, and reception of energy as vibrational waves in matter". "In a strange turn of historical events", Benjamin Steege explains, "it has become possible, perhaps even common, to define acoustics in almost completely nonaural terms";[10] what humans hear is just a tiny slice of the vibrating world.[11] So which is it? Is the acoustic about human aurality or vibrant matter? What is the relation between the two? And what has law got to do with it? Exactly. The task for an *acoustic* jurisprudence is not to resolve such questions in advance, but precisely to investigate them.[12] How does the acoustic appear in the

[8] James EK Parker, *Acoustic Jurisprudence: Listening to the Trial of Simon Bikindi* (1st edn, Oxford University Press 2015).
[9] Seth Kim-Cohen, 'No Depth: A Call for Shallow Listening', in *Against Ambience* (Bloomsbury 2013) 131–43.
[10] Benjamin Steege, 'Acoustics' in David Novak and Matt Sakakeeny (eds), *Keywords in Sound* (Duke University Press 2015) 22.
[11] Jonathan Sterne, 'Hearing' in ibid.
[12] Parker (n8).

texts and conduct of law? What kind of work is it doing? With what effects? How, finally, might our very conceptions of the acoustic be bound up with juridical practices of world making?

B is for bell, a juridico-acoustic technology of particularly long standing. In Franchino Gaffurio's treatise *Theorica Musicae* (1492), bells are used to illustrate the principles of Pythagorean harmony, so influential on Greek and Renaissance ideas of music, science, law and cosmology. And in Alain Corbin's extraordinary account of bell-ringing in 19th century rural France, village bells quite literally institute life.[13] They toll to mark the beginning and end of each work day, the call to mass, ceremonies and festivals, births, weddings, deaths, and funerals. They peal to mark the presence of the monarch, the opening and closing of the polls, the arrival of the tax collector, and to signal danger or joy. By virtue of their limited geographic reach, bells orient and territorialize. They are a technique of juris-diction: of law's acoustic expression. Which law? In Corbin's telling, the process of modernization from the 1830s onwards was a process of desacralization. During this period, bells became the objects of vigorous contestation between the ecclesiastical and other competing jurisdictions. At stake here was more than just authority or sovereignty over acoustic space, but entire modes of ordering life: in particular, the broad shift from qualitative to quantitative time. Today, bells still mark events of course. At the European Court of Human Rights, an electronic bell rings to call proceedings to order and again to bring them to a close. And when, in August 2017, London's "Big Ben" chimed for the "final time" in four years whilst Parliament's Elizabeth tower underwent restorations, only its marking of clock time was being muted. The 13-tonne bell would still ring out on New Year's Eve and Remembrance Sunday. Nevertheless, as if to confirm Corbin's analysis, the justification for this controversial move could hardly have been more secular, prosaic or – for that matter – juridical. The bell was silenced for reasons of workplace health and safety.[14]

C is for copyright, a way of protecting and monetising the circulation of – amongst other things – melodies, musical scores, audio -recordings, and ideas about our acoustic worlds. But also, and just as importantly, copyright is a profound intervention *in* those worlds that (i) stifles creative expression as much as it protects it, (ii) places legal interpretation at the centre of the creative process, and (iii) transforms practices of listening, since listening to sacred or festive music is, after all, very different from "listening-to-a-work".[15] It is not a matter of picking sides in the ongoing war between the so-called "copy left" and "copy right". One needn't align oneself with the

[13] Alain Corbin, *Village Bells: Sound and Meaning in the 19th-Century French Countryside* (Martin Thom tr, Columbia University Press 1998).

[14] Jessica Elgot, 'Big Ben Bongs Sound for Final Time for Four Years' *The Guardian* (London, 21 August 2017) <http://www.theguardian.com/uk-news/2017/aug/21/big-ben-bongs-to-sound-final-time-for-four-years>.

[15] Peter Szendy and Jean-Luc Nancy, *Listen: A History of Our Ears* (Fordham University Press 2008) 15.

politics of Pirate Bay and its proliferating strategies of lawfare or have a position on the aesthetic merits of plunderphonics, hip-hop or vaporwave to appreciate the basic jurisprudential point here. Copyright intervenes in the soundscape. It juridicizes creativity and the act of listening, just as norms of music production and consumption affect the law of copyright in turn.

D is for decibel (dB), a logarithmic unit for measuring the intensity of sound, officially endorsed by the International Organization for Standardization since at least 1971 and now commonly used by courts and legislatures all over the world in the regulation of sound and noise. The decibel is not just a technique of regulation, however. It is a *product* of it: a co-production of law, technoscience and, as it happens, the soundscape and citizenry of New York City. As Emily Thompson has shown, it was developed collaboratively by Bell Labs, the Johns-Manville Corporation and a range of others, including scientists at the Department of Health, in response to a call by the New York Noise Abatement Commission, which had been established in response to rising noise-related health complaints in 1929. The decibel wasn't the first unit developed to measure noise, just the most successful. The data it yielded for the commission – including the fact that the subway regularly reached 120 dB, the threshold for ear pain in humans – initiated a wide-ranging legislative response aimed at eliminating noises at the source: replacing whistle-blowing traffic police with silent traffic lights, amending building codes so that welding could be used to silence the noise of riveting, classifying a wide range of noises and simply making them illegal. When this did not result in a quieter city, a different regulatory response emerged: the mandating of new sound-absorbing building materials. Noise abatement turned from prohibition to architecture for help.[16]

E is for eavesdropping. According to Blackstone,

> eavesdroppers, or such as listen under walls or windows or the eaves of a house, to hearken after discourse, and thereupon to frame slanderous and mischievous tales, are a common nuisance and presentable at the court-leet: or are indictable at the sessions, and punishable by fine and finding sureties.[17]

250 years later, eavesdropping isn't just legal, it's ubiquitous. What was once a minor public order offence appended to the law of slander has become one of the most important politico-legal problems of our time, as the Snowden revelations made abundantly clear. But eavesdropping isn't just about surveillance and security. It is an emergent form of power that extends far beyond those idioms: the ever-increasing access to and capture of our sonic worlds by state and corporate interests. On behalf of

[16] Emily Ann Thompson, *The Soundscape of Modernity: Architectural Acoustics and the Culture of Listening in America, 1900-1933* (MIT Press 2002).
[17] William Blackstone, *Commentaries on the Laws of England: Vol 4* (Oxford University Press 2016) 169.

the world's most powerful governments and corporations, our smart-phones, televisions, toys, and CCTV cameras listen to us 24/7; always everywhere, always on, and often perfectly legally. "Please be aware that if your spoken words include personal or other sensitive information, that information will be among the data captured and transmitted to a third party through your use of Voice Recognition", Samsung explained in the so-called privacy policy for one of its Smart TVs in 2015.[18] Public pressure forced the company to change the wording, though not the effects, of this policy, and in March 2017 a new cache of documents released by Wikileaks referred to a CIA hack known as "Weeping Angel" which allegedly enabled the agency to exploit this function and listen-in on owners of Samsung TVs using the devices' built-in microphones.[19]

F is for forensics, the juridical art of deriving proof from matter. For Lawrence Abu Hamdan, the matter in question is sound. "Forensic listening" describes a range of practices all concerned with sound's ability to reveal truth. In Britain, one decisive moment was the *Police and Criminal Evidence Act* (1984) which, for the first time, required that police interview rooms be equipped with tape recorders. The law was intended to protect against falsification of confessions, but in doing so it yielded an enormous new archive for forensic investigation. "The act exponentially increased the use of speaker profiling, voice identification, and voice prints in order to, among other things, determine regional and ethnic identity as well as to facilitate so-called voice line-ups".[20] As these new techniques blossomed, so did the range of audio-evidence available for analysis. "Soon the forensic listener was required not only to identify voices, but to investigate background sounds in order to determine where, with what machine, and at what time of day a recording had been made – thus enabling a wide range of sonic frequencies to testify".[21] Testify to *what* exactly? And how to know? Abu Hamdan himself did the audio-ballistics for a case involving the shooting by Israeli soldiers of two Palestinian teenagers in the West Bank and, based on his analysis of recordings of the incident, was able to satisfy the court that the soldiers had fired live ammunition rather than rubber bullets as they'd claimed.[22] But he also warns against proliferating pseudo-science. A company called Nemesysco, for instance, claims to be able to detect everything from whether or not a person is lying, to embarrassment, anxiety, and even a propensity for sex-offending, simply by analysing their speaking

[18] Nick Grimm, 'Samsung Warns Customers New Smart TVs "Listen in" on Users' Personal Conversations' *ABC News* (10 February 2015) <http://www.abc.net.au/news/2015-02-10/samsung-warns-customers-new-smart-tvs-listen-in-on-users/6082144>.

[19] Sam Biddle, 'WikiLeaks Dump Shows CIA Could Turn Smart TVs into Listening Devices' *The Intercept* (7 March 2017) <https://theintercept.com/2017/03/07/wikileaks-dump-shows-cia-could-turn-smart-tvs-into-listening-devices/>.

[20] Lawrence Abu Hamdan, 'Aural Contract – Forensic Listening and The Reorganization of The Speaking Subject' (2014) 1 Cesura//Acceso 200, 202.

[21] ibid.

[22] 'Nakba Day Killings' *Forensic Architecture* <http://www.forensic-architecture.org/case/nakba-day-killngs/>.

voice. A study conducted by researchers at the University of Stockholm showed the company's claims to be bogus. But that hasn't stopped its software being bought up by the Los Angeles Police Department, European, Russian and Israeli governments, and insurance companies all over the world. At stake here is the difference between forensic listening and a new "phrenology of the voice".[23]

G is for gavel, a technique and symbol of acoustic authority. Gavels feature today in some of the most prominent institutions of international law – at the Grand Chamber of the European Court of Human Rights and at both the UN Security Council and the General Assembly, amongst others – as well as in many courts and legislatures internationally. Even in jurisdictions where the gavel doesn't appear in conventional legal settings, you will still find it at auctions, conferences and meetings, and when you do the gavel will be doing important juridical work. This work may not be uniform between institutions but there are clear continuities. The gavel's knock can issue a call to order or mark a decision or verdict. It can invoke silence on the one hand and closure on the other. This distinction is not necessarily something you can "hear" however. It isn't a matter of one knock or two, loud or soft. Most of the time, when we listen to the gavel's knock we listen "semantically", and in this respect both the meaning of the knock and the institutional work it performs depend less on the way the gavel is "played" than the context in which it is heard. But the gavel is also one of the most widely recognised symbols of law. Images of it are everywhere: in books, on TV, at the movies, and all over the web. Symbolically, the gavel speaks as much of law's promise as its threat. In its connections both to the hammer and the mace, the gavel is in equal parts tool and weapon. As a tool, it is world-making: tied to traditions of craftsmanship and labour. As a weapon, it is a technique of violence: a reminder of the intimacy between apparently anodyne juridical speech and sheer brute force.[24] But, of course, the gavel's semantic and symbolic dimensions are not entirely separate. Whether in court or parliament, orderly discourse is both a synecdoche and attempted exemplification of the order law aspires to and demands elsewhere.[25]

H is for hearing. Roland Barthes provides the following succinct definition, echoing a common position. "Hearing is a physiological phenomenon", he writes. "Listening is a psychological act". "It is possible to describe the physical conditions of hearing (its mechanisms) by recourse to acoustics and to the physiology of the ear".[26] Not so with listening. Hearing has to do with the body, listening the mind. Hearing is natural, listening enculturated. Contemporary work in sound studies suggests that things are not so simple: that even bodies have histories, that the ear-brain relationship

[23] Abu Hamdan (n 20) 223.
[24] Robert M Cover, 'Violence and the Word' (1986) 95(8) The Yale Law Journal 1601.
[25] James EK Parker, 'The Gavel' in Jessie Hohmann and Daniel Joyce (eds), *International Law's Objects* (Oxford University Press 2018).
[26] 'Listening' in Roland Barthes, *The Responsibility of Forms: Critical Essays on Music, Art, and Representation* (Reprint edn, University of California Press 1991) 245.

is both multidirectional and plastic, and that we "have no direct intellectual or experiential access to the faculty of hearing in its supposed state of nature" in any case.[27] From a jurisprudential perspective, the distinction is further complicated. *The* hearing is an institution. Though it may depend on a naïve concept of the human body, and an "able" body at that (legal institutions have historically been very bad at providing access to justice to the deaf or hearing impaired), the hearing also implies a certain kind of institutional space, the presence of certain institutional actors, certain norms and procedures of argumentation and judgment (*audi alteram partem* being one of the foundational principles of the common law), and a complex relationship with prior hearings and legal texts. Perhaps we should not be so surprised. The word hearing derives from the Old English, *heran* (Anglian), *hyran* (West Saxon), which meant not only to hear or "perceive by the ear", but also – crucially – to judge.

I is for the ineffable, the profound difficulty, even the impossibility, of putting certain experiences to words. Sound and music often get singled out in this respect: when people struggle to describe that special quality in a favourite singer's voice, or the power and impact of certain recordings and live performances. As Victor Hugo is supposed to have put it, "music expresses that which cannot be said and on which it is impossible to be silent".[28] For Vladimir Jankélévitch, in his little-known treatise on the topic, the ineffable is that which "provokes bewilderment". Like Hugo before him, for Jankélévitch music is ineffable not because it is somehow meaningless. If it resists description or cannot be explained, that is because "there are infinite and interminable things to be said of it", not zero. So it is only in the "imagining and dismissing, and doing it again, and again" of a piece of music's meaning, power and import, that "one asymptotically approaches an intimation of something that will elude any and all searchlights".[29] Consider the problem this poses for law, when legal institutions are called upon to determine a song or piece of music's (juridical) significance or effects. The demands of legal judgment – its peculiar urgency, and its pairing with institutionalised and ostensibly legitimate violence – are inherently in tension with Jankélévitch's insistence that we approach music "again and again", on to infinity. In law, remember, judgment must come soon, and it must be finite. But perhaps music is not such a special case after all. Perhaps it just points us particularly clearly to the dilemma of all legal judgment. In Derrida's well-known phrase: "Law is not justice. Law is the element of calculation, and it is just that there be law, but justice is incalculable, it requires us to calculate with the incalculable".[30]

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[27] Sterne (n 11) 72.

[28] On the somewhat mysterious origins of this quote and the idea it encapsulates, see Susan Fast and Kip Pegley (ed.), *Music, Politics, and Violence* (Wesleyan University Press 2012) 8.

[29] Carolyn Abbate, 'Introduction' in Vladimir Jankélévitch, *Music and the Ineffable* (Princeton University Press 2003) xiii.

[30] Jacques Derrida, 'Force of Law: The "Mystical Foundation of Authority"' (1990) 11(5–6) Cardozo Law Review 920, 947.

J is for jurisdiction, from the Latin *ius dicere*, to speak the law. The word judge has identical roots. *Iu-dex*: he who declares the law, she who pronounces judgement. In contemporary usage, jurisdiction refers primarily to matters of procedure, territory, and the conflict of laws. It is about the distribution of authority: about which institutions are authorised to do what, when, how, and on whose behalf. Jurisdiction, thus, is how law acts in the world. It is law's mode of articulation, what "gives legal form to life and life to law".[31] We could notice two things, therefore. First, jurisdiction installs questions of voice and audibility right at the heart of jurisprudence. Even if these connotations are subdued in, say, maritime disputes or controversies regarding the responsibility to protect in international law, that does not mean they are absent. After all, "if the law must speak in order to exist, [it] needs a mouth and voice".[32] The very idea of jurisdiction depends on a metaphorics – perhaps even a metaphysics – of the body. Second, thinking law in terms of jurisdiction opens up the question of law's acoustic expression more broadly. Different jurisdictions give voice to law differently in different places at different times: from the police car's siren to the church bells of Christianity to the call to prayer in Islam to the songlines of Aboriginal Australia. "The abstractness and immateriality of law is greatly exaggerated", McVeigh and Dorsett write with jurisdiction specifically in mind.[33] Sound remains a key feature of law's expressive life: its conduct, transmission, and embodiment.

K is for keynote sound, coined by R Murray Schafer in his seminal work *The Soundscape: Our Sonic Environment and the Tuning of the World*. "Keynote", of course, is a musical term: "the note that identifies the key or tonality of a particular composition": its anchor, the harmonic center around which everything else modulates.[34] In Schafer's hands, the phrase "keynote sound" is intended to capture something similar: those sounds so ubiquitous in a particular environment that, though they may not be listened to consciously, nevertheless come to orient and order life there. "The keynote sounds of a given place are important", he writes, "because they help to outline the character of men living among them".[35] Schafer is thinking primarily of "natural" sounds here – the sounds of "water, wind, forests, plains, birds, insects and animals" – because, as an early pioneer of sonic ecology, he is concerned about what is lost when the sounds of commerce and industry come to dominate instead. "Which sounds do we want to preserve, encourage, multiply?"[36] By now this question is well embedded in the debate around noise abatement, which for Schafer was already a matter of noise *pollution*. But the concept is fertile in other legal contexts

[31] Shaunnagh Dorsett and Shaun McVeigh, *Jurisdiction* (Routledge 2012) 1.
[32] Costas Douzinas, 'The Metaphysics of Jurisdiction' in Shaun McVeigh, *Jurisprudence of Jurisdiction* (Taylor and Francis 2007) 25.
[33] Dorsett and McVeigh (n 22) 5.
[34] R Murray Schafer, *The Soundscape: Our Sonic Environment and the Tuning of the World* (Inner Traditions/Bear & Co 1993) 9.
[35] ibid 9.
[36] ibid.

too. What might the keynote sounds of a contemporary courtroom be, for instance, working away *beneath* all the law-talk, the whispers, and the knocking of gavels? That familiar hum of strip-lighting, air-conditioning units, and computer fans, just audible over the soundproofed quiet: what do *these* sounds tell us? What are their effects on those "living among them"? Compared with, say, the open-air *Gacaca* courts of post-genocide Rwanda,[37] or "on country" hearings in Australia?[38] They speak perhaps of a financial situation deemed appropriate to the workings of urban contemporary justice, and a form of bureaucratic and technological efficiency which operates by means of a dislocation from the vicissitudes of time and place. Despite Melbourne's choking summer heat, despite London's chill winter, the waning light, and the civic hubbub outside, these sounds announce that work, the day-to-day business of judgment can and should go on regardless.

L is for law and listening, in their proximity and mutual constitution. Law *like* listening, law *as* listening, laws *about* listening, the laws *of* listening, listening *to* law, how *law* listens: law and listening, together and co-produced. Law and listening as ways of ordering experience, law and listening as techniques for encountering, knowing and making the world, law and listening as practices of judgment, as forms of rationality, as domains of expertise, as servants of capital, as techniques of domination, injustice and power. Law and listening: gendered and gendering, colonial and colonizing, raced and racializing, classed and productive of class relations. Law and listening: cognitive, embodied, technological, unconscious, historically constituted, aesthetic, ethical, normative, political. Law and listening: sites of opportunity and struggle.

M is for music, an object of legal governance, and not just in the worlds of intellectual property or noise abatement. Think of the great debates concerning the use of polyphony in sacred music during the Renaissance.[39] Think of New York City's infamous *Cabaret Law*, passed in 1926 and used to suppress the new forms of jazz that would emerge so explosively over the following decades.[40] Think of its British equivalent, the *Criminal Justice and Public Order Act 1994*, used similarly to outlaw raves with their "repetitive beats" as s 63 of the Act so infamously put it. Think of Simon Bikindi, accused by the International Criminal Tribunal for Rwanda of inciting genocide with his songs,[41] or the conviction of three members of Pussy Riot on charges of "hooliganism motivated by religious hatred" for a performance of their "Punk

[37] Phil Clark, *The Gacaca Courts, Post-Genocide Justice and Reconciliation in Rwanda: Justice without Lawyers* (Cambridge University Press 2010).
[38] Michael Black, 'Developments in Practice and Procedure in Native Title Cases' (2002) 13(1) Public Law Review 3.
[39] Parker (n 8) 17–19.
[40] Sara Ramshaw, *Justice as Improvisation: The Law of the Extempore* (Routledge 2013).
[41] *Prosecutor v Bikindi* (Judgment) ICTR-01-72-T (2 December 2008).

Prayer" at a Moscow Cathedral in 2012.[42] Think of the court's consistent attempts to prevent witnesses like Phil Ochs and Arlo Guthrie from singing during the trial of the Chicago Seven,[43] or the court's decision in *People v Kelly* to prohibit the use of particularly "evocative" music like Enya or Celine Dion in victim impact evidence at death penalty sentencing hearings.[44] In all these examples, the courts and legislatures in question are expressing certain musical imaginaries, understandings of what music is, how it works and what it does, and how all this relates to questions of social order and justice across different media and performance settings. But music is not just an object of law. For Desmond Manderson, it is also a source of it. Music necessarily serves a "normative, and thus a legal function", he writes, "establishing the conditions of life of which the law is but a particular expression".[45] Polyphony, bebop, rave, *imbyino*, punk, folk, Enya: they all contribute to the *nomos*. Music influences profoundly our senses of justice and relationships to legal institutions and authority. Moreover, that is often precisely how it ends up being the object of legal controversy in the first place.

N is for noise, currently "the number one quality of life issue for New York City residents",[46] and source of more than two hundred thousand official complaints in the first half of 2017 alone, all dealt with according to a thicket of national, state, and local regulations.[47] Obviously, the problem is not limited to New York. In an extraordinary report from 2011, the WHO concluded that in Western Europe the "disability-adjusted life years (DALYs) lost from environmental noise"[48] was "61,000 years for ischaemic heart disease, 45,000 years for cognitive impairment of children, 903,000 years for sleep disturbance, 22,000 years for tinnitus and 645,000 years for annoyance".[49] Whatever these numbers truly index, they are clearly intended to convey a sense of scale and urgency and to prompt a commensurate regulatory response.[50] And sure enough, the jurisprudence on noise is mounting, at least insofar

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[42] Desmond Manderson, 'Making a Point and Making a Noise: A Punk Prayer' (2016) 12(1) Law, Culture and the Humanities 17.

[43] Pnina Lahav, 'Theater in the Courtroom: The Chicago Conspiracy Trial' (2004) 16(3) Law and Literature 381.

[44] *People v Kelly* 171 P.3d 548 (Cal. 2007) 555.

[45] Desmond Manderson, 'Et Lex Perpetua: Dying Declarations & (and) Mozart's Requiem' (1998) 20 Cardozo Law Review 1628.

[46] 'Noise Code' (*NYC Environmental Protection*) <https://www1.nyc.gov/site/dep/environment/noise-code.page>.

[47] Michael Gartland, 'Noise Complaints Reaching New Highs Amid City's New Rules' *New York Post* (New York, 28 June 2017) <https://nypost.com/2017/06/28/noise-complaints-reaching-new-highs-amid-citys-new-rules/>.

[48] According to the report, "DALYs are the sum of the potential years of life lost due to premature death and the equivalent years of 'healthy' life lost by virtue of being in states of poor health or disability".

[49] Frank Theakston (ed), *Burden of Disease from Environmental Noise: Quantification of Healthy Life Years Lost in Europe* (World Health Organization, Regional Office for Europe 2011).

[50] Directive 2002/49/EC of the European Parliament and of the Council of 25 June 2002 Relating to the Assessment and Management of Environmental Noise [2002] OJ L189/12; Saeed Hydaralli,

as it affects humans. The effects of noise on animals and marine life are another matter entirely. Anthropogenic underwater sound – "ocean noise" caused by a whole range of military, commercial and industrial sources: shipping, sonar, the use of high energy airguns in seismic surveying – is a mounting ecological crisis. It is not just a matter of hearing loss or noise-induced stress and disease, though these are all prevalent. "To many scientists, it is the cumulative impact of subtle behavioural changes that pose the greatest potential threat from noise": a kind of "death of a thousand cuts" as the former Chief Scientist of the US' National Oceanic and Atmospheric Administration put it.[51] "That some types of sound are killing some species of marine mammals is no longer a matter of serious scientific debate".[52] And yet, from a legal perspective, desperately little is being done about it. Certainly, there is no international legal instrument purporting to deal comprehensively with ocean noise. And in both Canada and the US, commercial shipping, which currently contributes around 75 per cent of the world's ocean noise,[53] is specifically exempted from existing regulations.[54] Noise, for Jacques Attali, is always an expression of power. As such, it does not exist in itself, but only in relation to the system within which it is inscribed".[55] Evidently, this is a system which is profoundly anthropocentric and where the laws of listening are frequently aligned with the interests of capital.

O is for oath, a – perhaps *the* – quintessentially juridical form of vocalisation, whether in or out of court, sworn by a witness, a president,[56] a lawyer or a judge. The oath is a "speech act", to use JL Austin's well-known terminology: a "performative utterance", speech that binds.[57] *How* does it bind? On this question, Michelle Duncan points out, Austin was "lamentably silent on the role of the voice".[58] "As a condition of enunciation", Duncan writes, "the manner in which an utterance is spoken … must

'What is Noise? An Inquiry into its Formal Properties' in Michael Goddard, Benjamin Halligan and Paul Hegarty (eds), *Reverberations: The Philosophy, Aesthetics and Politics of Noise* (Continuum 2012) 219-232.

[51] Michael Jasny, *Sounding the Depths II: The Rising Toll of Sonar, Shipping and Industrial Ocean Noise on Marine Life* (Natural Resources Defense Council 2005) v.

[52] ibid.

[53] Alexander Gillespie, 'Vulnerability and Response to the Risk of International Shipping: The Case of the Salish Sea' (2016) 25(3) Review of European, Comparative & International Environmental Law 317.

[54] Max Ritts, 'Amplifying Environmental Politics: Ocean Noise: Amplifying Environmental Politics: Ocean Noise' (2017) 49(5) Antipode 1416.

[55] Jacques Attali, *Noise: The Political Economy of Music* (vol 16, Manchester University Press 1985) 26.

[56] Marianne Constable, *Our Word Is Our Bond: How Legal Speech Acts* (Stanford University Press 2014).

[57] John Langshaw Austin, *How to Do Things with Words* (Oxford University Press 1975).

[58] Michelle Duncan, 'The Operatic Scandal of the Singing Body: Voice, Presence, Performativity' (2004) 16(3) Cambridge Opera Journal 289. "Tone of voice", "cadence", and "emphasis" are briefly alluded to in Austin's sixth lecture, but they are never taken up again in detail.

surely enter into the equation of its variability".[59] If a witness tried to whisper or shout or sing their oath, or if their delivery seemed overtly ironic or sarcastic, that would surely render it ineffective: not merely incomprehensible, intimidating, or beautiful, but "infelicitous" too. As a speech act, the oath would fail. That the range of possible acoustic infelicities is neither closed nor known in advance doesn't change anything in this respect. Indeed, the fact that the proper delivery of the oath so rarely presents a problem in practice is evidence of the extent to which the norms of oralization are entrenched, not proof of their absence. But even more than the specifics of vocal delivery, it is the fact of vocalisation *per se* that matters most where the oath is concerned. Yes, there is a correlation between the oath's content, what the speaker thereby commits themselves to and the juridical consequences that may, therefore, result in the case of proven breach. Yes, the oath involves a kind of "theological prejudice" and may summon a certain metaphysical weight, even without any religious text being directly involved.[60] But in the end, the act of oath swearing is about surrendering one's (speaking) body to the authority of the institution, *whether or not* the mind or soul are also in tow. An act of vocal submission which marks the transition "from the external world to the internal order of legal process".[61]

P is for prudence, as in juris-prudence, the prudence of *ius*: "law's consciousness and conscience",[62] a concern for law's good conduct. For Cicero, prudence was a "means for negotiating a dynamic field of expectations and demands, one replete with tensions that could be managed only through skilful attention to the requirements of public performance".[63] Prudence, thus, is what is required "precisely when one is no longer safely within a realm wholly determined by one art, one subject, one group, one objective",[64] as one always is where law is concerned. Prudence "cannot be reduced to an abstract set of principles or goals because it recognises that each situation calls for a different response; a different assessment of the forces that are playing themselves out, of strategic possibilities and limitations".[65] Jurisprudence is not therefore about the realisation of some foundational, all-encompassing justice, but the responsible navigation of a whole range of competing, and possibly even incommensurable demands. If it is a form of reason or rationality, then it is certainly not in the usual sense. Prudence is more a matter of conduct and craft. It "is distinct

[59] ibid 291.
[60] Jacques Derrida, *Of Grammatology* (Gayatri Chakravorty Spivak tr, Johns Hopkins University Press 1976) 323.
[61] Manderson (n 45) 1642–3.
[62] Douzinas and Gearey, *Critical Jurisprudence: The Political Philosophy of Justice* (Hart Publishing 2005) 3.
[63] Robert Hariman, *Prudence: Classical Virtue, Postmodern Practice* (Pennsylvania State University Press 2003) viii; Marcus Tullius Cicero, *On the Ideal Orator* (first published 55 BCE, James M May and Jakob Wisse tr, Oxford University Press 2001) 16-23.
[64] Robert Hariman and Francis A Beer, 'What Would be Prudent? Forms of Reasoning in World Politics' (1998) 1(3) Rhetoric & Public Affairs 299, 303.
[65] Douzinas and Gearey (n 62).

from both theoretical knowledge and wisdom", Michael Charland explains, "in that it is not conceptual but performed: prudence is manifest in 'right action' … not a form of knowledge but an embodied type of understanding".[66] Which is to say, amongst other things, that prudence is just as concerned with the technical, material, and affective dimensions of the practice of judgment as it is the logical or calculative. To do jurisprudence is to recognise that we are responsible for law for many different reasons and in many different ways: including in relation to its audibility and engagement with our sonic worlds. An acoustic jurisprudence, thus, is about opening up scholars and practitioners' ears to the diverse ways in which law and sound deeply and necessarily bound to each other. Its ambition, thus, is not – or not exclusively – doctrinal change. More or better laws will not do the work of improving the world on their own. If it is normative, an acoustic jurisprudence is about developing a greater sensitivity to questions of sound with a view to thinking and practicing law better.

Q is for Queer. For Drew Daniel, "all sound is queer". Not in the way that this or that song by Judy Garland, Madonna, Lil' Louis or Bikini Kill might be queer: precisely not in its recognizability, coding or association with this or that queer subculture. "At its worst and most alienating", Daniel writes,

> the experience of music generates not belonging, not identity, not community, but an oppressive experience that … Althusser termed 'Hailing'… Hey you! You are this kind of person! This is your music! The obligation to 'Enjoy!' is the ceaseless imperative of the culture industry and its sub-cultural variants.[67]

If music, in this sense, is normative, sound queers identity.

> The promiscuous open-ness of the ear, a hole that takes all comers, means that we as living systems are open to and invaded by the world. Sound queers the self/world boundary, all day, every day. In doing so, it blurs the edges of any self that the subject-machine cares to hail; even in the midst of the 'hey you, here's your house music' there are other noises afoot, other sounds playing, other ways to become something more or less than one more obedient minority subject.[68]

The queerness of sound extends far beyond the formation and politics of identity though. It is epistemological (since the indexicality of sound, its bond to the object or event that produced it, is always compromised), ontological (in its materiality, its existence as and rendering of the listener as "vibrant matter"[69]), and political too (because "the confusing eruption of the sonic into our life … makes possible a certain kind of … perceptual community that we share together by remaining perpetually open to the world beyond that community").[70] Each of these dimensions of sound's

[66] Maurice Charland, 'Lyotard's Postmodern Prudence' in Robert Hariman (ed) *Prudence: Classical Virtue, Postmodern Practice* (Pennsylvania State University Press 2003) 263.
[67] Drew Daniel, 'Queer Sound' (2011) 333 WIRE 42.
[68] ibid.
[69] Jane Bennett, *Vibrant Matter: A Political Ecology of Things* (Duke University Press 2009).
[70] Daniel (n 67).

queerness has consequences for legal thought and practice… to the point that we might begin to wonder whether law isn't queer too? In spite of and against itself?

R is for recording, audio-recording, the first known mechanism for which was invented and patented in 1857 by Édouard-Léon Scott de Martinville some twenty years prior to any device that could also reproduce the sounds it had captured. We can say this with certainty now since in 2008 an organisation called First Sounds was able to "play back" several "phonautograms" – graphic traces produced by the machine's stylus on smoked glass – from as early as 1860, which it then made available online under a creative commons licence.[71] Today, the reproducibility of recorded sound is simply taken for granted, along with the proprietary nature of virtually all audio-recordings, media devices, platforms and formats. But it is worth reflecting on the logic at work in their pairing and what it implies about the (juridical) worlds in which they take place. Consider this notion of the "reproduction", for instance. There is a sense in which it is simply a fallacy. What I hear when I listen back to Martinville's 1860 "recording" of *Au Claire de la Lune* is mostly crackle and fuzz: not at all identical to what was "actually" sung, or what anyone present that day would have heard. According to Jonathan Sterne, historically, the analytic response to this acoustic gap between recording and reproduction has typically been in terms of what he calls the "discourse of fidelity".[72] Thereby, the difference between the two is always figured as a loss which the latest and greatest technology always promises to overcome, but never can. And if the notion of the "reproduction" is problematic, so too is that of the "recording" because the possibility of *re*-production transforms the practice of production itself. The singer sings, the lawyer speaks, the witness testifies *to* the microphone, *to* the media-technological network that will enable its later "reproduction" and proliferation. The "recording" is always already mediated. Sterne's point is generalizable in at least a couple of ways. First, recordings aren't just mediated by the technologies involved and performance practices involved but also by the laws governing those technologies and performances: not just the law of intellectual property, but also privacy, criminal, constitutional law and so on, depending on the context. Second, in a world in which every smartphone is also a recording and playback device, and in which we know that audio and data from these devices is constantly being captured, both covertly and as a function of complex and non-negotiable user agreements, the precise ways in which we allow (or are made to allow) these devices to modify our behaviours has significant social, political, and justice implications.

S is for soundscape. For Schafer, who started using the term at the end of the sixties, the soundscape was simply our "sonic environment", or "any portion of the

[71] 'Our Sounds' (First Sounds) <http://www.firstsounds.org/sounds/>

[72] Jonathan Sterne, 'The Social Genesis of Sound Fidelity' in *The Audible Past: Cultural Origins of Sound Reproduction* (Duke University Press 2003).

sonic environment regarded as a field for study".[73] Thus, forests, coastlines, villages and cities were all included, but also musical compositions, factories, concert halls and radio broadcasts. In each case, Schafer's project was overtly normative. It was about the cultivation and preservation of "sounds that matter" (for Schafer, mostly the harmonious sounds of "nature") as well as "raging against those which don't" (manmade, mechanical, dissonant).[74] And although law reform was certainly important in this respect, for Schafer it was always secondary to and dependent on the broader revolution in listening he hoped to bring about. Thus "multitudes of citizens (preferably children) needed to be exposed to ear cleaning exercises in order to improve the sonological competence of total societies", since "if such an aural culture could be achieved, the problem of noise pollution would disappear".[75] Jurisprudentially, there are a few possible gestures here. First, to diversify the politics of listening so that ecological concerns – important as they are – are not the soundscape's only possible measure. Second, to extend the range of soundscapes under investigation to include those of key legal institutions and practices: to study diverse judicial, legislative, deliberative and carceral[76] soundscapes, for instance, and to think through how sound matters there and why. Finally, to deepen the account of law so that the question is no longer simply: how might law be mobilised to preserve or improve the soundscape? But also: in what ways are our sonic environments already lawful? And: how is sound experienced through or in relation to law? It is a matter of recognizing, in other words, that the soundscape is always also a lawscape.[77] Our sonic worlds have as much to do with civilization as nature.[78]

T is for transcription, an essential but little remarked upon feature of legal practice. Its Western roots are in ancient Rome and the method of shorthand – the *notae tironianae* – developed by Cicero's clerk Marcus Tullius Tiro.[79] But the system practiced at hearings and depositions today is much more sophisticated, a complex function of at least three technical registers. First, the technological: an assemblage comprising the court reporter's shorthand machine and proprietary software like CATalyst, the "industry leader" in so-called "computer aided transcription".[80] Second,

[73] R Murray Schafer, *The Book of Noise* (Prize Milburn 1968); R Murray Schafer, *The New Soundscape* (Berandol Music 1969) 1; R Murray Schafer, *The Soundscape: Our Sonic Environment and the Tuning of the World* (Knopf 1977) 274.

[74] Schafer (1977) 12.

[75] ibid 181.

[76] Tom Rice, 'Sounds inside: Prison, Prisoners and Acoustical Agency' (2016) 2(1) Sound Studies 6; Lily E Hirsch, *Music in American Crime Prevention and Punishment* (University of Michigan Press 2012).

[77] Andreas Philippopoulos-Mihalopoulos, *Spatial Justice: Body, Lawscape, Atmosphere* (Routledge 2015).

[78] Thompson (n 16) 2.

[79] Anthony Di Renzo, 'His Master's Voice: Tiro and the Rise of the Roman Secretarial Class' (2000) 30(2) Journal of Technical Writing and Communication 155.

[80] 'Stenograph News' (*Stenograph L.L.C.)* <http://www.stenograph.com/>.

the skill of the reporter: their virtuoso dexterity of a "writer" combined with a highly developed form of audible technique which requires them to listen phonetically rather than semantically (which is to say a totally different form of listening to everyone else involved in the judicial soundscape). Third, and more institutionally now: a whole series of judgments concerning both *what* should be transcribed – what sights and sounds are worthy of "enscription"[81] – and *how* this should then be represented "on paper". Today, stenographers increasingly work from digital recordings, off-site and after the fact, a development which they say compromises the quality of the transcripts they produce.[82] Where/whenever transcription takes place, though, it undoubtedly intervenes in the soundscape. Consider practices like the recitation of appearances, the reading of the case, or simply speaking "for the record". In all these examples, the act of oralization is doing something totally different to what it does in the case of, say, oath swearing or the pronouncing of judgment. It is less a matter of orality, ritual, or publicity than *dictation*. The purpose is simply to establish a usable archive of proceedings, in the knowledge that appeal is always a possibility, and which both anticipates and appreciates the material labour involved in managing the "Babylonian stacks of files" upon which contemporary legal practice also depends.[83]

U is for the United Nations (UN), not an organization one would immediately associate with the relationship between law and listening. But consider the challenge posed by an institution with 193 Member States whose citizens speak many more languages than that. The UN is a veritable Babel, and if it somehow functions, that is largely the result of a system of "simultaneous interpretation" which has come to dominate the soundscape of international law and relations since it was first developed "by trial and error in an attic" at the Nuremberg trials in 1945.[84] Today, for reasons that are both pragmatic and (therefore) highly political, the UN operates in six official languages. By virtue of r 52 of its *Rules of Procedure*, any speech given in any of these languages must be interpreted into all of the rest.[85] Considering that the standard team for a six-language meeting comprises fourteen interpreters, the scope of this commitment is immense.[86] And its consequences for the deliberative soundscape are just as far-reaching. For simultaneous interpretation to work, every relevant space must be hardwired for sound: microphones, headphones, and multi-channel receivers made available at each desk; acoustically separate booths must be made available to

[81] Joseph Sung-Yul Park and Mary Bucholtz, 'Public Transcripts: Entextualization and Linguistic Representation in Institutional Contexts' (2009) 29(5) Text and Talk 481.

[82] Chris Summers, 'Is Stenography a dying art?' *BBC News* (London, 27 April 2011) <http://www.bbc.com/news/magazine-13035979>.

[83] Cornelia Vismann, *Files: Law and Media Technology* (Stanford University Press 2008) 1.

[84] Francesca Gaiba, *The Origins of Simultaneous Interpretation: The Nuremberg Trial* (University of Ottawa Press 1998) 11.

[85] UN Rules of Procedure of the General Assembly, A/520/Rev18, Rule 52.

[86] 'Interpretation Services: Department of General Assembly and Conference Management' (*United Nations*) <http://www.un.org/depts/DGACM/interpretation.shtml>.

interpreters; these interpreters must not only speak multiple languages but have been trained in the exceptionally difficult art of listening and speaking at the same time in different languages; for speakers, simultaneous interpretation requires that they slow down and pause regularly, and that they learn to "play" their hardware correctly; listeners must learn to listen past the fractured rhythm and strange intonation of interpreted speech.[87] Simultaneous interpretation mediates almost all official UN discourse. Indeed, it is virtually a condition of its possibility.

V is for voices, the many registers in which law and vocality encounter each other. A provisional survey: the voice as thought's instrument, the necessary medium in speech, its acoustic form and material support; the voice, paradoxically, that "disappears" in the utterance, that turns our attention to the what as opposed to the how of discourse;[88] the voice that seems to imply a will or agency therefore, the voice in its seeming proximity to ideality or subjectivity itself;[89] or again, the voice that *troubles* notions of intent: the "scandalous" voice,[90] in its corporeality, with its grain;[91] the affective voice: the voice that luxuriates in itself, the "voice beyond logos", the voice that moves and stirs;[92] the voice in its "extimacy": neither interior nor exterior, uncanny;[93] voices that swear; voices that testify; voices that judge and condemn; voices that are heard; voices that aren't; voices silenced; voices misunderstood; God's voice; the dictator's voice;[94] the people's voice, at protests and polls; gendered voices;[95] raced voices;[96] the voice as an apparent index of nationality or class; voice "lineups"; "voiceprints"; voice recognition software; Adobe Voco; forensic phonetics; forensic transcription; voice acoustics and other forms of vocal science; live voices; recorded voices; broadcast voices; intercepted voices;[97] clear voices; distorted voices; damaged voices; non-voices: the cough, the laugh, the sob, the cry of pain;[98] "visible" voices;

[87] Parker (n 8) 190–202.
[88] Mladen Dolar, *A Voice and Nothing More* (MIT Press 2006) 15.
[89] Jacques Derrida (n 60).
[90] Shoshana Felman, *The Scandal of the Speaking Body: Don Juan with J L Austin, or Seduction in Two Languages* (Stanford University Press 1983) 66.
[91] Roland Barthes, 'The Grain of the Voice' in *Image, Music, Text* (Stephen Heath tr, Fontana 1977) 179–89.
[92] Dolar (n 88) 30.
[93] ibid 96.
[94] Max Horkheimer and Theodor W Adorno, *Dialectic of Enlightenment: Philosophical Fragments* (first published 1987, Gunzelin Schmid Noerr ed, Edmund Jephcott tr, Stanford University Press 2002) 129.
[95] Adriana Cavarero, 'Women Who Sing' in *For More than One Voice: Toward a Philosophy of Vocal Expression* (Stanford University Press 2005).
[96] Jennifer Lynn Stoever, *The Sonic Color Line: Race and the Cultural Politics of Listening* (NYU Press 2016).
[97] Ava Kofman, 'Finding Your Voice: Forget About Siri and Alexa — When It Comes to Voice Identification, the "NSA Reigns Supreme"' <https://theintercept.com/2018/01/19/voice-recognition-technology-nsa/>.
[98] Dolar (n 88) 23.

acousmatic voices;[99] authoritative voices; hateful voices; interpreted voices; transcribed voices; the voice in the text as it sings.[100] It is not just that the voice is at the very centre of legal thought and practice. It is there in all its extraordinary diversity: from the metaphysical to the supposedly mundane.

W is for weapon, and more specifically the growing weaponization of sound. "Sonic warfare", to use Steve Goodman's term: the manipulation of our sonic environments and listening bodies for the purposes of inflicting violence, terror, coercion, and control.[101] We could imagine a spectrum. At one end, sound at extreme volumes. So extreme, in fact, that volume may not even be the right word, where what is being exploited is sound's brute materiality and intensity, its explosive, assaultive force: the GBU-43/B Massive Ordnance Air Blast, dropped by the U.S. in Afghanistan on 13 April 2017, so loud that it shattered windows and terrified residents literally miles away;[102] IED explosions in Iraq, the compression wave from which can be so "big" and so "heavy" that it may "permanently deafen and concuss those who are exposed to it";[103] the sonic booms unleashed at the order of Israel's Prime Minister Ehud Olmert on the people of Gaza night after night for five full weeks in 2006.[104] At the other end of the spectrum a device like the Mosquito, used to ward off "undesirable" teenagers at malls and train stations since 2005 by means of its high pitched buzz, inaudible to anyone over the age of about twenty-five: more gently and differentially coercive now.[105] In between, shades of physical and psychological trauma and duress produced in a whole range of different contexts: music torture at Guantanamo;[106] silent prisons in Syria;[107] the psychic trauma of living under drones in Pakistan: not just the "buzzing, mosquito-like sound" they make, but everything this sound portends;[108] the role out

[99] Brian Kane, *Sound Unseen: Acousmatic Sound in Theory and Practice* (Oxford University Press 2014).
[100] Cavarero (n 95) 131–2.
[101] Steve Goodman, *Sonic Warfare: Sound, Affect, and the Ecology of Fear* (MIT Press 2012).
[102] SE Rasmussen, '"It Felt like the Heavens Were Falling": Afghans Reel from Moab Impact' *The Guardian* (Kabul, 14 April 2017) <https://www.theguardian.com/world/2017/apr/14/it-felt-like-the-heavens-were-falling-afghans-reel-from-moabs-impact>.
[103] J Martin Daughtry, 'Thanatosonics: Ontologies of Acoustic Violence' (2014) 32(2 (119) Social Text 25, 38.
[104] Susan Schuppli, 'Uneasy Listening' in Eyal Weizman, Haus der Kulturen der Welt and Franke Anselm (eds), *Forensis: The Architecture of Public Truth* (Sternberg Press 2014).
[105] Mitchell Akiyama, 'Silent Alarm: The Mosquito Youth Deterrent and the Politics of Frequency' (2010) 35(3) Canadian Journal of Communication 455.
[106] Suzanne G Cusick, '"You Are in a Place That Is out of the World. . .": Music in the Detention Camps of the "Global War on Terror"' (2008) 2(1) Journal of the Society for American Music 14; Morag Josephine Grant, 'Pathways to Music Torture' (2014) (4) *Transposition: Musique et Sciences Sociales* <https://transposition.revues.org/494?lang=en>.
[107] Lawrence Abu Hamdan, *Saydnaya (The Missing 19dB)*, Sharjah Biennial, March 2017.
[108] 'Psychological Terror? Lessons from Pakistan and Yemen on the Psychological Impact of Drones' *All Parties Parliamentary Group on Drones* (5 March 2013) <http://appgdrones.org.uk/appg-meetings/psychological-terror-lessons-from-pakistan-and-yemen-on-the-psychological-impact-of-drones-5-march-2013/>.

of technologies like the Long Range Acoustic Device in urban policing all across the world.[109] And through all of this, law is there at every turn, not just as a check on this emergent form of power but actively productive of it: complicit; part of the problem. Sonic warfare is a co-production in which law is less war's other than its medium.[110]

X is for xenophonia, from the Greek *xenos*, meaning foreign or strange, and *phone*, meaning sound or voice. The term appears very occasionally, though unsystematically, in the medical literature to refer to a range of vocal abnormalities and speech disorders.[111] But in principle it is much more suggestive. Xenophonia: strange speech; a voice that sounds different or foreign; more and other than just an "accent": the voice of the other; xenophobia's auditory counterpart; a technique of ear discipline; the consequence of historically accreted practices of racialized speaking and listening. Now the term would get at something close to what Jennifer Stoever (following W.E.B. Du Bois) calls the "sonic color line": "both a hermeneutics of race and a marker of its im/material presence".[112] For Stoever, the sonic colour line "enables listeners to construct and discern racial identities based on voices, sounds, and particular soundscapes … and, in turn, to mobilize racially coded batteries of sounds as discrimination by assigning them differential cultural, social, and political value."[113] Think of the use and cultivation of "black voice" in minstrelsy and its connections to the law and policy of Jim Crow. Think of the constant policing of African American or Aboriginal Australian vernacular Englishes in schools, corporations, and courts by virtue of what Stoever calls the "white ear".[114] Or think of the infamous booing of Adam Goodes – celebrated Australian rules football player, indigenous man, and former Australian of the Year – for months after performing an indigenous war dance during a match in 2015. As Stan Grant wrote in the Guardian, "to Adam's ears, the ears of so many Indigenous people, these boos are a howl of humiliation. A howl that

[109] James EK Parker, 'Towards an Acoustic Jurisprudence: Law and the Long Range Acoustic Device' (2015) 14(2) Law, Culture and the Humanities 202.
[110] James E K Parker, 'Sonic Lawfare: On the Jurisprudence of Weaponised Sound' (2019) Sound Studies https://doi.org/10.1080/20551940.2018.1564458.
[111] Zhiqing Wang, Wenjun Yu and Yiting Cai, 'Treatment of Xenophonia in Male Youths by Extralaryngeal Massage and Language Training' (1993) 13 Journal of Traditional Chinese Medicine 221-2; Zis Panagiotis and Bryan Timmins, 'Xenophonia: A New Term in Psychiatry?' (2009) 33(7) Psychiatric Bulletin 275.
[112] Jennifer Lynn Stoever, *The Sonic Color Line: Race and the Cultural Politics of Listening* (NYU Press 2016) 10–11.
[113] ibid 11.
[114] ibid 277–280.

echoes across two centuries of invasion, dispossession and suffering".[115] Xenophonia: the vocal expression of racist colonial power; a specifically acoustic form of injustice.[116]

Y is YouTube, by far the dominant way of accessing music freely and "legally" online today. According to one industry report from 2017, YouTube accounted for "46% of all time spent listening to on-demand music" that year.[117] Which makes YouTube, and more to the point its owners Alphabet (which also owns another streaming service in Google Play), a massive player in the law, policy, culture, and economics of contemporary music consumption. But it isn't just music you'll hear on YouTube. Nor is it only humans doing the listening. In March 2017, Dan Ellis, a Research Scientist at Google's "Sound understanding Team", announced the launch of AudioSet, a collection of over 2 million ten-second YouTube excerpts totalling some 6 thousand hours of audio, all labelled with a "vocabulary of 527 sound event categories".[118] According to what Google refers to as AudioSet's "ontology", the category "human sounds", for instance, is broken down into "human voice" (which includes tags like "speech", "shout", "screaming" and "whispering"), "respiratory sounds" ("breathing", "cough", "sneeze" …), "human group action" ("clapping", "cheering", "applause", "chatter", "crowd" …) and so on across six other categories. Elsewhere in the dataset, there are currently 76,767 samples labelled "inside, small room" and a further 4,221 labelled "gunshot, gunfire". The avowed purpose of all this is to use the dataset to train Google's "Deep Learning systems" in the vast and expanding archive YouTube so that, eventually, it will be able to "label hundreds or thousands of different sound events in real-world recordings with a time resolution better than one second – just as human listeners can recognize and relate the sounds they hear".[119] The point, of course, is to make sound searchable, and so monetizable in turn. And not just in YouTube. With ubiquitous and increasingly autonomic computing,[120] the rise of voice operation, and so increasing comfort levels with devices that are set to listen by default, YouTube is just the kindergarten for a potentially

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[115] Stan Grant, 'I Can Tell You How Adam Goodes Feels. Every Indigenous Person has Felt it' *The Guardian* (30 July 2015) <https://www.theguardian.com/commentisfree/2015/jul/30/i-can-tell-you-how-adam-goodes-feels-every-indigenous-person-has-felt-it>; discussed in Poppy de Souza, 'What Does Racial (In)justice Sound Like? On listening, Acoustic Violence and the Booing of Adam Goodes' Continuum: Journal of Media and Cultural Studies (forthcoming).

[116] de Souza (n 115).

[117] *Connecting with Music: Music Consumer Insight Report* (IFPI 2017) <http://www.ifpi.org/downloads/Music-Consumer-Insight-Report-2017.pdf>.

[118] Dan Ellis, 'Announcing AudioSet: A Dataset for Audio Event Research' (*Google AI Blog*, 30 March 2017) <https://ai.googleblog.com/2017/03/announcing-audioset-dataset-for-audio.html>.

[119] Jort F Gemmeke et al, 'Audio Set: An Ontology and Human-Labeled Dataset for Audio Events' (2017 IEEE International Conference on Acoustics, Speech and Signal Processing, New Orleans, 5-9 March 2017) 776.

[120] Antoinette Rouvroy, *Governmentality in an Age of Autonomic Computing: Technology, Virtuality and Utopia* (Routledge 2011) 125.

enormous corporate listening apparatus – an algorithmic "panacousticon"[121] – the effects of which we should not expect to be benign.

Z is for zoning, a crucial technique of noise abatement, an "attempt to legislate the landscape of urban life", as Thompson puts it.[122] But there is already too much in this lexicon on the regulation of noise. Z is for Eberhard Zwicker then, the influential psychoacoustician whose research was crucial to the invention of the mp3 audio coding format, source of considerable litigation over the years, but patent-free in the EU since 2012 and with only a few remaining US patents today.[123] Too esoteric perhaps. Z could be for Zulu Nation, the early hip-hop pioneers headed by Afrika Bambataa and known for their political radicalism, afro-futurism, and enormous influence on contemporary (music) culture. But why them of the countless musicians whose work is demonstrably world making? Frank Zappa, Ziggy Stardust or John Zorn, for instance, just to name a few Z's? After all, it is not just law and narrative that are "inseparably related" as Robert Cover put it,[124] but also law and music, law and lyrics, law and the rhythmachine?[125] Am I reaching here? Maybe. But I'm tempted to agree with Stephen Connor that "there is something arbitrary or superfluous about the letter z":[126] that is not so much a letter at all, in fact, as a non-letter whose main function seems to be to close out the alphabet, and even then, "far from rounding off the sequence of letters with a satisfying finality, making A to Z the equivalent of Alpha to Omega", can only muster a kind of "bathetic dribbling away".[127] The fact that there are connections to be made at all here could therefore be read as testament to how much has been left out where a letter seemed more resonant or fertile. The point is this: even these twenty-six entries offer only the merest opening into a world of jurisprudence that has hardly been explored.

[121] Peter Szendy, *All Ears: The Aesthetics of Espionage* (Fordham University Press 2017) 16–23.
[122] Thompson (n 16) 125.
[123] Jonathan Sterne, *MP3: The Meaning of a Format* (Duke University Press 2012).
[124] Robert M Cover, 'The Supreme Court, 1982 Term—Foreword: Nomos and Narrative' (1983) 97 Harvard Law Review 1, 5.
[125] On Afrofuturism and the rhythmachine *see* Kodwo Eshun, *More Brilliant than the Sun: Adventures in Sonic Fiction* (Interlink Publishing Group Incorporated 1998).
[126] Connor (n 3) 170.
[127] ibid 193.

THE DREAMING, NEVER TO BE LOST: A CRITIQUE OF THE GOVE LAND RIGHTS DECISION

*Upendra Baxi**

Preface

It is very kind of *Jindal Law and Humanities Review*—and particularly of Neeta Maria Stephen, Dikshit Sarma Bhagabati, and Malini Chidambaram—to invite attention to my unpublished manuscript on indigenous people of Gove Island who waged an epic struggle against Nabalco, a multinational company for mining bauxite. The paper has not been published as yet but it has had wide circulation among some in Australasian teaching, research, struggle, and archive communities (for example, it is archived in the National Library in Canberra). It was the product of a short but intense struggle to break the conspiracy of silence concerning Australian indigenous peoples and their land rights. Many of our students worked with them and dispensed legal and human rights services, and the course we started on law and indigenous peoples did spread across most Australian law schools. It was mainly a young people's movement and I was pleased to have had the good fortune of initiating it in small ways.

The paper appears in the original form as presented to the Australian Law Teacher's Conference at Hobart, Tasmania, 1972, and owes its present publication to the labours of love by Professor Tony Blackshield. It bears the mark of those times and thoughtways. The learned anonymous referees have pointed out that many expressions may now seem politically incorrect and may even cause hurt to sentiments. While the editors and I have tried to rigorously edit away some expressions, those that remain are ones which were argued and articulated in the judgment. To alter these arguments verbally now will be to change expressions used there in quote marks; and will impermissibly rewrite the judicial documents.

The paper offers a strictly jural analysis and it may be rightly found wanting from a movement, campaign, or a struggle perspective. But a strict juridical analysis

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may often contribute to these action strategies, and even contribute to the redressal of grave historical injustice. This seems to have happened somewhat through the historical struggles that indigenous peoples have waged and won since the first case—*Milirrpum v Nabalco* (1971)—to which this paper is directed.

Among the landmark situations have been the *Mabo* decision of the Australian High Court which recognized the native indigenous title,[i] the state level recognition of "first Australians" beginning with the amendment of the Victorian Constitution in 1975 (followed by Queensland, New South Wales, and South Australia), and the remarkable statement of "Apology" by the Federal Parliament on 13 February 2008. Mention must also be made of the Expert Panel of the Commonwealth of Australia, which reported in January 2012 and made several just and far-reaching recommendations for constitutional amendments. As of 2014, a most authoritative treatise on constitutional law says that the "idea of recognizing of Aboriginal peoples is supported by each of Australia's main political parties but this has yet to be matched by agreement on terms of any such change".[ii]

In lived reality, even cold statistics point to entrenched institutionalized racism: even when indigenous peoples make up 3 per cent of the population, their share in the prison population is about 30 per cent; about 50 per cent of all detainees in the youth detention system are indigenous peoples; and more than 430 indigenous people have died in prison since the Royal Commission into Aboriginal Deaths in Custody, 1991. The recent Black Lives Matter protests throughout Australia further highlighted that 16.5 per cent more indigenous peoples die in custody than White Australians. It would seem that the "local thoughts of justice"[iii] still remain difficult to articulate in this postmodern world.

It was in the class that my students expressed their curiosity about Indian indigenous peoples; I could tell them a bit about their constitutional position but I had no experience on the ground and I assured them that I will do some work as soon as the opportunity to serve in India arose. This happened sooner than anticipated when the University of Delhi invited me in 1972. And since then I have had the good luck to work with many indigenous peoples in India. We all met, some years ago, in Delhi to celebrate the silver jubilee of the *Samatha* judgment.[iv]

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[i] *Mabo v Queensland* [No 2] (1992) 175 CLR 1.

[ii] AR Blackshield and George Williams, *Australian Constitutional Law & Theory: Commentary and Materials* (6th edn, George Williams, Sean Brennan and Andrew Lynch, eds, The Foundation Press 2014).

[iii] I derive this expression inspired by Alain Badiou from Penelope Pether, 'Militant Judgement? Judicial Ontology, Constitutional Poetics, and "The Long War" (2008) 28 Cardozo Law Review 2279.

[iv] *Samatha v State of Andhra Pradesh* AIR 1997 SC 3297.

I was writing at that time on epistemic injustice. Comparing it with ecocide, a term that Polly Higgins endeavoured to popularize,[v] I said that if ecocide stands for the wanton destruction of the environment and its accompanying wicked justifications, epistemicide[vi] signifies the intended systematic destruction of indigenous knowledges and the nativist capacity to think, learn, and articulate alternate conceptions of the knowledge of good life. May I reiterate what I said then: it is more important in thought and action to be *Ab-original* rather than *original*.

Upendra Baxi
5 September 2020
New Delhi

[v] See, Polly Higgins, *Eradicating Ecocide: Laws and Governance to Prevent the Destruction of Our Earth,* (Shepheard-Walwyn 2010); Polly Higgins, *Earth Is Our Business: Changing the Rules of the Game*, (Shepheard-Walwyn 2012).

[vi] A category developed most by Bonaventura de Souza Santos in the context of emancipation: see Santos, *Epistemologies of the South: Justice against Epistemicide* (Routledge 2014).

I. Introduction

For almost two centuries after its settlement, Australia has maintained a unique, but rather unworthy, distinction of being the only major common law country whose judicial system had no role to play in the determination of community policies towards the "land rights" of its indigenous peoples.

To be sure, this fact can be sought to be explained in a benign, hostile or "neutral" manner. The benign manner of explanation might stress the distinctive nature of the complex Aboriginal social organization, of a type perhaps nowhere encountered by British colonizers and governors in the early period of settlement. Such an approach might stress (even if to modern ears quite feebly) the policies of enlightened paternalism and official benevolence to which judicial imprimatur would have added but little.

The hostile manner of explanation might detect a steady emergence of a genocidal design in the heritage of governmental policies towards Aboriginal peoples since the Australian settlement, under the legitimating banners of "assimilation" and "integration". Such an explanation might indict the legal profession as a whole (academic and professional lawyers as well as judges) for the abdication of social responsibilities towards the most conspicuously underprivileged minority group in Australia for nearly two centuries. And such indictment may well have a solid foundation in fact. The legal system and courts have been used to impose *liabilities* on Aboriginal peoples (through the application mainly of "western" criminal law) rather than to confer *rights*. For the vindication of this sort of proposition, one does not have to go even as far back in history as 1836, which witnessed the decision in *R v Jack Congo Murrell*[1]; one needs only to recall the disgraceful trial of Mrs Nancy Young in 1970.[2]

The neutral or "balanced" manner of explanation might stress the limitations of the legal technique in shaping inter-civilizational relationships, even while making an inventory of political and professional biases which cumulatively led to a situation of the lack of legal recourse. Such an approach may well point to a multitude of problems and frustrations inherent for both sides in a haphazard contact situation. These include, notably, the slow growth of social and cultural anthropology; the difficulties of effective governmental decision-making and implementational control, both as affecting colonial decision-makers in England and Australia; the uneven penetration of technology and the corresponding variable range of economic development; the demographical variations in the overall size of Aboriginal peoples' population (and the crudity of such measurements and estimates); and finally, the genuinely held values of the colonial and deeply Eurocentric ethic. All these factors, and many more, could be harnessed under this approach without it becoming an

[1] (1836) 1 Legge 72.

[2] See G Robertson & J Carrick, 'The Trials of Nancy Young' (1970) 42 Australian Quarterly 34.

apology for the destruction of the Aboriginal society, the default of the legal profession, and the disuse of courts for securing the just entitlements of indigenous peoples.

The bare truth remains, amidst all this, that the Australian judiciary at no stage became involved as a co-ordinate branch of the Government in policy-making concerning the justice of dispossession and the land entitlements of Aboriginal peoples. And that truth, together with its overall significance for Australian legal and social history, is still, after two centuries, in search of an adequate socio-historical explanation.

It is indeed deeply ironical that the very first attempt on behalf of Aboriginal peoples to vindicate through the judicial process their subjectively felt just entitlements to land, should have been recorded by history as a dejection. For, the thirteen plaintiff Aboriginal clans in *Milirrpum v Nabalco Pty Ltd*[3] failed to establish that the common law recognized their communal native title in 1788 and that this title was not so far extinguished either with their consent or through explicit legislative termination as required on their version of the common law position.[4] In a 153-page closely reasoned judgment, characterized by exemplary conscientiousness, Mr Justice Blackburn of the Northern Territory Supreme Court ruled against almost every major legal contention of the plaintiff. While the liberalism, thoroughness, and the grand style of judicial craftsmanship ensures this judgment has a pre-eminent place in the Australian and common law history, the decision at the same time effectively seems to oust all future Aboriginal plaintiffs from claiming recognition of their traditional land entitlements from *all* Australian Courts. This may not have been the intention of the *Milirrpum* Court, but it is a fateful consequence of the decision and the way in which it was reached.

In a way, the *Milirrpum* situation came much too late before the Australian judiciary for it to play any significantly innovative role in the governmental decision-making affecting Aboriginal peoples' claims. Colonization of Australia was an accomplished fact. And the intransigent legal doctrine received and shaped by legislators and judges alike, asserting the Crown's ultimate title over all land in the commonwealth, was too firmly entrenched to be questioned.[5] Substantial destruction of the Aboriginal society was already a *fait accompli*.[6] At the time of the suit, the Yirrkala were themselves under the Australian impact for about a quarter-century.[7] Dramatic advances in the techniques and range of mineral exploitation, with the growth of burgeoning overseas export markets, had begun to affect the Northern Territory since 1953.[8] The three-hundred-million-dollar operation for bauxite mining by Nabalco had already commenced even as the Court was asked to declare invalid the very

[3] (1971) 17 FLR 141 [294]; hereafter referred to as *Milirrpum*.
[4] *Milirrpum* [198].
[5] *Milirrpum* [243]-[252].
[6] C D Rowley, *The Destruction of the Aboriginal Society* (ANU Press 1970).
[7] *Milirrpum* [146]-[149].
[8] See e.g., *Parliamentary Debates*, 6 February 1952, 14; 18 September 1953, 405; 21 September 1955, 803.

Ordinance of 1968 which authorized it. The policy of dedicating royalties for mining to an Aboriginal benefit Trust Fund under the Northern Territory (Administration) Act had also become well-settled by the time of the *Milirrpum* action.[9] Already under this Trust Fund, royalties from the Nabalco operations were estimated to range from $ 600,000 in 1971 to $ 870,000 annually in 1975. Projections for the magnitude of the Trust Fund assets in 1975 were as high as five-million-dollar reserves by 1975, with an annual input into the Fund of about one million dollars.[10] Already, in 1963, a Select Committee of the Federal Parliament had enquired into the grievances concerning excision of the subject land from the Arnhem Land Reserve, and recommended, *inter alia*, a generous compensation together with effective consultation arrangements with affected Aboriginal groups and for the protection of sacred sites.[11] The committee, however, had carefully refused to base this recommendation on any recognition of the legal entitlements on the part of the petitioners.[12] The Black Power movement was nascent, nourished by a perceived failure of the indigenous organizations' traditional pressure group activities to achieve a modicum of justice in race relations.

A very complex structure of facts, events, and policies (only silhouetted in the preceding paragraph) provided the environment in which the *Milirrpum* situation came before the Court. But of these facts, events, and policies, explicit judicial notice was taken only of the colonization process as affecting the native land-holding, and that too, only to the extent the legal context required it. Even so, the total environment must have conditioned the perception of choices open to the Court and the very act of choice-making itself. In this sense, the entire endeavour of using the Court was an act of faith, invoking the "genius" of the common law system to act as a catalyst to rectify accumulated historical imbalances inevitable (but not for that reason scarcely morally justified) in the colonial system, *long after that system had been irreversibly institutionalized*. Despite the monumental patience, sympathy, integrity and the industry of the Court and Counsel, was it to be reasonably expected that an Australian Court (and for that matter any court) could at this point of history come to a different conclusion than the *Milirrpum* court reached?

The question suggests not a kind of judicial determinism but is rather directed to the environment of overall constraints of historicity in which judgments of justice must be made. Indeed, further constraints arise from the legal process itself, from the self-definition of the judicial role by the instant judge, and from the nature of demands in the title of justice brought before the Court. The constraint of the legal process arises

[9] See Section 21(3)(b) of the Northern Territory (Administration Act) 1910-1969; *Parliamentary Debates*, 16 September 1969, 1409. A study of the history of the Trust Fund and patterns of disbursements under it is now in progress.

[10] *Parliamentary Debates*, 16 September 1969, 1409-1411.

[11] See Select Committee on Grievances of Yirrkala Aborigines, Arnhem Land Reserve (Parliamentary Paper No 953, 1963).

[12] ibid 951.

from what might be called (following Wittgenstein) the rules of the adjudication game. But the self-definition of judicial role could reinforce or relax such rules, wholly or in part. Such self-definition cannot be expected to be consistent. We glimpse part of this truth in Mr Justice Blackburn's *Milirrpum* decision. On the one hand, (as we shall note in detail in Section II of this paper) the learned Judge has been liberal, flexible, and policy-oriented in relaxing the rigour of the rules of the "adjudication game".[13] On the other, His Honour almost consistently maintains a sharp distinction between "law" and "policy" on dealing with a whole range of substantive issues.[14]

Such self-definition of judicial role finally is also a function of the nature and scope of justice demands made upon a Court in a specific litigation situation. The enormity of justice demands must have been one factor leading to sharp segregation of "law" and "policy" in *Milirrpum*. The gist, in justice, of the Aboriginal plaintiffs' claim was not that the common law unequivocally recognized the communal native title in 1788 as open to extinction either only by their consent or by an appropriate legislative measure, but rather that the equivocal authoritative legal materials ought to be so construed by the Court, insofar as this was analytically open, as to affirm the plaintiffs' principal contentions.

The situation before the *Milirrpum* Court called for a just adjustment of a number of salient conflicting interests. The social interest in the cultural autonomy and preservation of indigenous lifestyle conflicted with the social interest in the "assimilation" of Aboriginals peoples into a modern industrial society. The social interest of economic well-being of about six-hundred Aboriginal persons, of the Yirrkala Mission, conflicted with that of nearly 21,000 indigenous persons of the Northern Territory who were all beneficiaries of royalties paid by the mining enterprise at Gove through the Northern Territory Trust Fund.[15] The social interest of all Aboriginal groups and White Australians throughout Australia in the exploitation of natural resources and national economic development was here in conflict with the social interest of the Yirrkala in their community's economic well-being through acknowledgement of its rights of ownership.

If one finds the calculus of interests too pragmatic a way of looking at the overall justice situation, its formulation in terms of the grand theories of justice does not make it any less intransigent to a satisfactory rational decision. The natural law justification of the Dreamtime entitlements of the Aboriginal peoples' to "their" land is here asserted against the natural law entitlements of the White colonizers resting in the ruthless belief that:

> [T]he whole earth was open to the industry and enterprise of the human race, which had the duty and the right to develop the earth's resources: the more

[13] *Milirrpum* [151]-[165], [208], [252]-[262].
[14] See part V of this paper.
[15] *Hansard* (n 10).

> advanced peoples were thus justified in dispossessing, if necessary, the less advanced.[16]

How is one to rationally resolve these conflicting justness-es?[17] Blackburn J ruled, for example, that although Australia had "settled inhabitants" and "settled law" at the time of settlement by English people, in terms of applicable law Australia was nevertheless a "desert and uncultivated" (and uninhabited) territory at the relevant time.[18] Admittedly, this was a gigantic legal fiction. But so was the notion of Dreamtime, the master legal fiction of the Aboriginal legal system. Are we to take the view that in such a situation that master fiction is to prevail which forms a base of the legal system commanding decisive force? *No* way out of these and many other justice-dilemmas can be self-evidently satisfactory. Whatever the result, and the reasoning underlying it, it will be greeted by a chorus of dissent.

The *Milirrpum* decision was, therefore, a most difficult one to make, even when one recognizes that judges are accustomed to making decisions on complex matters of law and fact. Because this was so, any critical evaluation of *Milirrpum* must be based on an effort which roughly corresponds to the effort invested by the Court and Counsel. The present critique is accordingly confined only to a few aspects of this historic decision. No overall conclusions emerge from it but such specific conclusions as it yields are indicative of the mood and method of the comprehensive critique now in progress, of which this present paper is only a part.

II. The Nature and Limits of The *Milirrpum* Court's Liberalism

The *Milirrpum* case, the very first major case involving Aboriginal peoples as plaintiffs, was argued in two distinct phases before Mr Justice Blackburn. The Court's handling of the intricate issues of fact and law is noteworthy for its flexibility and liberalness. In part, this must be attributed to the extraordinary nature of the *Milirrpum* situation. And Mr Justice Blackburn was clearly conscious of the "far-reaching significance" of the issues involved.[19] No doubt, it is a recognized duty of courts to ensure proper and fair canvassing of a whole range of relevant issues involved in the litigation. But it is equally true that the rules of the adjudication game are not self-evidently compatible with the performance of this duty. It is, therefore, important to identify the distinctive ways in which Mr Justice Blackburn facilitated a comprehensive enquiry into the plaintiffs' claims.[20]

A. From Mathaman to Milirrpum: The Silent Workings of History

[16] *Milirrpum* [200].
[17] See for this notion, AE Ehrenzweig, *Psychoanalytical Jurisprudence* (AW Sijthoff 1971) 194-200.
[18] *Milirrpum* [291], [244]-[245].
[19] ibid.
[20] Obviously, the three areas emphasized in this Section of the paper do not exhaust illustrations of "flexibility" and "liberalism". The whole judgment is imbued with this spirit. See for further examples, *Milirrpum* at [193], [209]-[210], [211], [214], [255], [265].

In *Mathaman v Nabalco Pty Ltd*,[21] the first phase of the litigation, Mr Justice Blackburn declined to exercise the inherent powers of the Court to terminate the suit summarily. His Honour held that the plaintiffs' case was neither frivolous nor vexatious.[22] Nor was it so obvious as a matter of fact and law that the plaintiffs had no case to prove as to warrant a threshold dismissal, without adequate hearing.[23] Indeed, the learned Judge was far from convinced, at this stage of the proceedings, of the defendant's argument that the "interest claimed by the plaintiff was non-existent in the eyes of law",[24] though ultimately this is what the holding in *Milirrpum* amounts to. On the procedural issue, Blackburn J relied on the general principle that "convenience and flexibility should be paramount in matters of procedure" and further that this principle "should not be overridden by the desire to contain the procedural remedies within established categories".[25] Adherence to this principle dictated the learned Justice's preference for the more liberal among the somewhat divergent authorities binding upon the court.[26]

While the ultimate conclusion was thus favourable to the plaintiffs, they were directed to deliver a fresh statement of claim. The primary reason for this directive was the Court's finding that, aside from adverse possession, the statement of claim did not sufficiently reveal the legal basis of the claim, subsequently to be identified as the "doctrine of communal native title".[27] But other important directives for amendment of the statement of claim, adopted by the plaintiffs, proved in the event to be decisive against them. Thus, paragraph 6 of the original statement merely claimed that the Rirratjingu and the Gumatj clans "have and at all material times have had a proprietary interest" in the subject land. The Court directed that a full explanation of the "proprietary interest claimed must be given".[28] The term "clan" was also required to be rather clearly explained.[29]

The flexibility and liberalness in declining summary dismissal of the plaintiffs' claims were thus tinged with the clarity and firmness of the directives for the preparation of a fresh statement of claim. The *Mathaman* Court, and parties before it, had no means of foretelling that the ultimate losses arising from such firmness will cancel away the immediate gains stemming from flexibility on matters of procedure. The *Mathaman* Court made look possible for the plaintiffs what the *Milirrpum* Court

[21] (1969) 14 FLR 10.
[22] ibid 12.
[23] ibid 12-13.
[24] ibid 22.
[25] ibid 19.
[26] ibid 15-19. The present writer, however, must confess that the divergence stressed by Blackburn J between the two lines of authority is too subtle for him to completely understand.
[27] ibid 23-24; *Milirrpum* [198].
[28] (1969) 14 FLR 25.
[29] ibid.

was to demonstrate as impossible. Here we have in miniature the dialectical processes of history doing their silent work.

B. The Hearsay Culture vs The Hearsay Rule

The *Milirrpum* plaintiffs had to demonstrate that they held the subject land in continuity from their ancestors since 1788, the critical date marking the advent of common law into a territory it regarded as "waste and uncultivated". The ten witnesses of this pre-eminently oral culture were, however, confronted at the very outset by the hearsay rule of the law of evidence.[30] Was a statement by an Aboriginal witness to the effect that his father (now dead) told him that a particular tract of land was the land of the Gumatj clan admissible?

Inevitably, the so-called exclusionary hearsay rule, to which as many as twenty-one major common law exceptions have been identified,[31] was invoked by the Solicitor-General. The arguments against admissibility of such evidence were indeed formidable. The Court was asked not to depart from the law of evidence simply on the ground that the substantive issues were "novel" and unprecedented or on the ground that matters of proving Aboriginal law and custom were unusually difficult.[32] Nor was there any authority for viewing the complex modifications of the law of evidence in the British colonies in Africa as a part of the common law applicable in Australia.[33] Furthermore, the recognized exceptions to the hearsay rule permitting "reputation" evidence did not apply to the instant situation; the exceptions applied only to (a) ancient rights enforceable under English law;[34] (b) private, rather than public or general rights;[35] (c) situations where there was an "identity" of community in which reputation is held with the community "which enjoys the right which the reputation seeks to establish".[36]

Mr Justice Blackburn agrees with the basic argument that the Court was "bound to apply the rules of evidence" regardless of the uniqueness or unprecedented complexity of the present case. But this acquiescence was immediately qualified by the refreshingly clear assertion: "…the rules of evidence are to be applied rationally not mechanically".[37] Almost all the contentions of the defendants entailed "mechanical" rather than "rational" application of the hearsay rule. Aboriginal peoples' evidence was

[30] *Milirrpum* [153].
[31] R Cross, 'The Scope of the Rule Against Hearsay' (1956) 72 Law Quarterly Review 91.
[32] *Milirrpum* [153].
[33] ibid [158]-[159].
[34] ibid [155].
[35] ibid [156].
[36] ibid [157].
[37] ibid.

admissible under the "exception to the hearsay rule relating to the declarations of deceased persons as to the matters of public and general rights".[38]

Not all of the learned Solicitor-General's contentions can be justly characterized as "mechanical" (rather than "rational") applications of the hearsay rule and its progeny of exceptions. Thus, for example, it was not at all irrational for him to argue that the reputation evidence exception to the rule must be confined to customary rights which were "for centuries known to, and capable of determination and enforcement by, the common law".[39] To so argue would have been, of course, to limit the utilization of the reputation rule only to those categories of rights for which there was some sort of precedential recognition.

In characterizing this argument as "mechanical", Mr Justice Blackburn *is, in fact, extending the scope of the reputation evidence exception to proof of public rights in order to make possible the verification of the plaintiffs' claim that the common law* recognized *communal native title in 1788.* What makes the Solicitor-General's argument "mechanical" is not his reliance on the traditional understanding of the scope of the rule, but rather His Honour's extension of this scope.

Counsel's arguments rested on *his* policy views that the reputation rule ought *not* to be so extended, though it seems to be the case that these policy views were not clearly developed before the Court.

A close and careful study of the judgment supports the above proposition. For, Mr Justice Blackburn who commences his enquiry by clearly acknowledging that the "novelty of the substantive issues" does *not* furnish "any ground for departing from the rules of the law of evidence which the Court is bound to apply" ultimately concludes by acknowledging precisely the opposite:

> …In my opinion, the proper conclusion…is not that there is no authority for the admission of reputation evidence…but *that the situation is a new one* and that the true rationale of the reputation principle allows, indeed requires that it be applied.[40]

The "true rationale" of the reputation principle, however, is to waive the application of the hearsay rule when necessary; why does the Court, in this case, feel that such waiver of the rule is necessary? The only answer I can find in the judgment is simply in the conclusion that it is *not* rational to foreclose the possibility of Aboriginal peoples proving the recognition of their communal native title by the common law in 1788 by the simple and rather crude device of denying their competence to testify. To so hold is to hammer yet another nail into the coffin of the hearsay rule; and who would

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[38] ibid; Sidney L Phipson, *Phipson on Evidence* (11th edn, Sweet & Maxwell 1970) [972].
[39] *Milirrpum* [155].
[40] ibid [158].

mourn its demise today?[41] But to thus hold is also to seize an opportunity to do justice within the law to an unspeakably depressed and deprived minority group in Australian society. Indeed, it would have been most extraordinary to hold otherwise: a hearsay (oral) culture would have been denied its day in the Court by the hearsay rule.

C. Anthropology and Chemistry: Weight vs Admissibility

The *Milirrpum* plaintiffs sought support for their claims in the expertise of two eminent professors of anthropology: WEH Stanner and RW Berndt. Only the latter had done some substantial fieldwork in the Gove peninsula (amounting to about eighteen months in all).[42] Professor Stanner's first-hand acquaintance with the subject land was limited to a rather modest aggregate of eleven days.[43] Their evidence was undoubtedly of great assistance to the Court; but it was not a product of legal ethnography, which surprisingly is still at a very nascent stage in Australia.

Once again, the hearsay exclusionary rule was reiterated in support of the defendants' contention that the evidence was inadmissible. The essence of this position was that the "anthropologist's sources of knowledge of the facts upon which they based their opinion included what they had been told by the aboriginals".[44] But this reliance on the "hearsay" of the culture under study is inherent in the craft of anthropology: the defendant's contention, in effect, was that the Court must forego the benefit of the anthropological understanding of the complex Aboriginal social organization, in the very case in which the Court can ill afford to be thus ignorant. The hearsay rule in this version must indeed be called a "nascence" rule.

The *Milirrpum* Court's ruling on this issue is of considerable significance for legal ethnographers everywhere. Blackburn J held that anthropology is a "valid field of study" in which "the process of investigation…manifestly includes communicating with human beings and considering what they say".[45] The law of evidence through the hearsay rule cannot allow the making of distinctions between, for example, anthropology and chemistry. The former involves knowledge concerning the behaviour of human beings; the latter involves knowledge concerning "inanimate substances in reaction".[46] The courts, on this reasoning, must not discriminate between natural sciences and social sciences. The hearsay rule of the legal system cannot be allowed to impugn the scientific integrity of cultural anthropology.

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[41] See DE Harding, 'Modification of the Hearsay Rule' (1971) 45 Alternative Law Journal 531; *but see* the comments of Mr Justice Wells (South Australia) in the same at 561-66. The rhetorical question in the text of course is put in the context of the application of the rule in civil cases.
[42] *Milirrpum* [160]-[161].
[43] ibid [159]-[160].
[44] ibid [161].
[45] ibid.
[46] ibid.

A further interesting objection to the admissibility of the expert evidence was that such evidence suffered from "conceptualization". It was difficult to disentangle the facts of Aboriginal peoples' behaviour empirically observed by anthropologists from the concepts used to study such behaviour and to generalize overall findings. This objection could have been more effectively raised by the defendants if they had referred at this point to the now famous, if somewhat wearisome, disputation between two eminent legal ethnographers: Max Gluckman and Paul Bohannan. Bohannan's insistence that legal ethnographers should sharply distinguish between "folk-systems" (the ideas of people who are being studied) and "analytical systems" (which anthropologists create by resort to scientific methods) marches rather well with the Solicitor-General's point concerning "conceptualization".[47] Our own ideas about what "ownership" means are a part of our "folk-system"; Aboriginal ideas about "belonging to land" are a part of their folk-system. Aboriginal ideas should be expressed in their terms. In relation to his studies of the Tiv in Nigeria, Bohannan observed: "…it is just as wrong and just as uncomprehending to cram Tiv cases into the categories of the European folk distinctions as it would be to cram European cases into Tiv folk distinctions".[48]

Professor Gluckman is second to none in asserting that legal anthropologists ought to be vigilant and should avoid such category mistakes. But he maintains, "however, determined one may be to present a folk-system in its purity, one cannot escape from the use of one's language".[49] And Gluckman rightly points out that social anthropologists do have to use concepts distinctive of that discipline in any field-study. If so,

> there is no difference in using the language of western social anthropology and using the language of western jurisprudence.… Theoretically, both are equally distorting even while they may be illuminating. It is mere prejudice for social anthropologists to consider that the scheme which jurisprudents have used successfully for the analysis of western law, cannot be applied to clarify the law of another "folk system". It is particularly prejudice, if their own systems of analysis can be reduced to almost exactly the same logical procedures.[50]

Mr Justice Blackburn can be seen to accept the Gluckman view, at least to a point. His Honour accepts as "tentatively appropriate"[51] the experts' reference to "rights", "claims", "land-owning groups". If they were not allowed to use analytical constructs such as these, they would have to express their evidence in terms of Aboriginal languages or invent arbitrary symbols. The latter will no further facilitate

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[47] P Bohannan, *Justice and Judgment Among the Tiv* (Waveland Press 1957) 119-20.

[48] ibid.

[49] M Gluckman, *The Judicial Process among the Barotse of Northern Rhodesia* (2nd edn, Manchester University Press 1967) 381.

[50] ibid 404; see also M Gluckman, *The Ideas in Barotse Jurisprudence* (Manchester University Press 1965) 251-72.

[51] *Milirrpum* [165].

communication than the use of western analytical construct. Furthermore, the low state of learning made discourse in terms equivalent to the cosmologies of Aboriginal peoples rather impossible.[52] Conceptualized anthropological evidence was certainly admissible "without prejudice" to the Court's task of deciding whether the Aboriginal peoples' relationship with land is proprietary on a "proper jurisprudential analysis of that relationship".[53]

The problem raised by the Solicitor-General was only partially met by the Court's ruling favouring the admissibility of the anthropological evidence, including all its "conceptualizations". The ensuing problem for the Court was: what significance (or "weight") should be attached to the expert evidence? Clearly, the expert testimony was significant when it corresponded with the testimony of the ten Aboriginal witnesses from eight different clans.[54] And the expert testimony generally would be used as providing the overall conceptual framework within which specific aspects of the Aboriginal evidence could be understood and appraised.[55] So far the conceptualizations of the experts were welcome, useful, and weighty.

But when the expert testimony diverged from the Aboriginal evidence, the significance of the former dwindled almost to the point of extinction. The preference of the *Milirrpum* Court of the testimony of Aboriginal witnesses over that of the experts was not an unconsidered one. The Court was aware of the constraints under which the Aboriginal witnesses testified. And the great consideration and sympathy with which Counsel and the Court treated the witnesses alleviated the inherent difficulties only to an extent. The ten Aboriginal witnesses were probably testifying for the first time in their lives. Miss Rose, the interpreter, spoke and understood only Gumatj language.[56] The witnesses accordingly testified both in Gumatj (in which they were all presumably proficient) and occasionally imperfect English. Their unfamiliarity with the process must have added to the strain and delicacy surrounding the elaborate attempt by the Court and Counsel to obtain the most authentic evidence.

[52] ibid [165], [269].

[53] ibid [165]. What does it mean to say that the expert testimony of this kind is acceptable to the Court "without prejudice"? If the expert testimony is accepted on the basis that it should not predispose the Court to view the evidence in terms of scientific knowledge, then the infusion of such testimony is rather fruitless. To put it crudely, the whole function of expert evidence is precisely to prejudice the Court, in the sense of creating dispositions (either way) for viewing the contentions before the Court from the vantage point of science. To be sure, it is the prerogative of the Court, in fact, its duty, to decide the case before it; the experts cannot strictly be permitted to usurp that function. And the ultimate significance of the expert testimony for a case at hand thus depends *not really on what experts say*, *but what the Court understands the experts to be saying*.

[54] *Milirrpum* [166], [176]-[177], [195].

[55] *Milirrpum* [163], [165]-[168].

[56] ibid [269]. The transcript is full of illustrations where the interpreter was unable to translate an English term into Gumatj and *vice versa*.

The Court was naturally, in these circumstances, reluctant to place full reliance on the Aboriginal testimony.[57] Despite this reluctance, on some rather important issues, the judgment discounts the expert evidence precisely by invoking Aboriginal evidence. This process often involves an acute conflict between "analytical" and "folk-systems", of which the Court seems to be unaware.

Thus, for example, Professor Berndt testified that the "normal composition of the band…would be made up of a core of members of a particular clan"[58] but the Court found that "not one of the ten aboriginal witnesses, who were from eight different clans, said anything which indicated that the band normally had a core from one clan…"[59] This was a very important, perhaps a decisive, divergence of opinion. The learned Judge preferred the Aboriginal evidence, not the experts'.

But this preference is simply canvassed as compelled by a direct divergence from what the experts and the Aboriginal witnesses said. In the process, the all-important question was not asked: is the notion of a "band" an analytical concept devised and used by anthropologists to understand and explain Aboriginal social organization or is it a folk/indigenous concept held by Aboriginal peoples themselves? Or, is it both?

In elucidating the notion of band, Blackburn J characterizes it as a "technical word" used by the experts. And so indeed it was. When asked whether "horde" was the same as "band", Professor Stanner explained that it was, adding that a number of other terms are also used by the anthropologists who are "a great word-making family".[60] It is reasonable to infer that the notion of "band" was thus an analytical conception, useful to the anthropologists to identify one facet of the indigenous social system. Another example of (what the Solicitor General termed) conceptualism was the notion of *mata-mala* pair which the learned Judge rightly identified as a "piece of anthropological analysis" rather than a "feature…of their everyday existence as it appeared in the evidence".[61]

Was the notion of band a concept of the folk system as well? If it was, the Court's preference for the Aboriginal evidence over the expert testimony may have some justification. But if the notion of band was not a folk concept at all, the appeal to Aboriginal evidence is an entirely unsatisfactory way of weighing the expert testimony. This is so because for all that we know the witnesses might have interpreted the questions put to them as requiring, in answer, a description of what they did for livelihood. Answers such as "they" went hunting and fishing together certainly signified that members of many clans cooperated in food and material gathering

[57] *Milirrpum* [179].
[58] ibid [168].
[59] ibid [169].
[60] *Milirrpum* Transcript, 65.
[61] *Milirrpum* [174].

activities. But the crucial question was: did they perceive themselves as forming any particular sort of group? Did the word "band" make sense to them as the term "clan" and "moiety" did? If not, how can anything they said in evidence be regarded to be decisive (as against the anthropologists) on the issue of the band's composition?

The analytical concept of a band was an attempt to give the traditional activities of food and material gathering by Aboriginal peoples a group character. The "group" which anthropologists called "band" was amorphous, fluctuating in composition, and of such varying degrees of duration in time that "indeed, one group might not be recognizable as such over a period of one year or even less, or might persist over a longer period".[62] It is entirely possible that the Aboriginal witnesses did not regard themselves as falling within or constituting a distinctive, secular, economic collectivity, just as people commuting daily by train from a suburb to the downtown offices or people drinking at a pub may not regard themselves as a group.[63]

To impeach or verify the conclusions reached by an anthropologist, fellow anthropologists will need to do substantial fieldwork. Here, the *Milirrpum* Court is performing the task of a fellow anthropologist in conditions which do not permit its satisfactory performance at all. In other words, the notion of "band" which was a notion *about* the indigenous social system is here identified by the Court as a notion *of* their system, without compelling reasons or evidence. The Court's finding that the band was not an "economic arm" of the clan played a key role in the conclusion that clans *as such* did not have a secular proprietary interest in the subject land.[64] But this finding is based on a decisive but very dubious weight given to the Aboriginal witnesses' testimony and on a rather inadequate appreciation of anthropological testimony.

It might be urged at this point that this distinction between analytical and folk concepts regarding bands does not make any significant difference. For, whether the Aboriginal witnesses labelled it as band or not, and regardless of how we label it, they did testify to a collectivity using the land for "economic" purposes. *This* collectivity did not have a majority of members at any given time from any particular clan. The *Milirrpum* Court can be understood as saying precisely the above, and its use of the term "band" in this context is unfortunate.

With this, the present writer would agree. The point of the foregoing critique is not that the Court was necessarily wrong in its conclusion; but that its approach involving a direct comparison between the anthropological testimony and the Aboriginal evidence was not justified. The Court saw itself as preferring one set of evidence as against another; as giving less weight to the experts and more weight to the indigenous witnesses. Such preference would entail, however, a greater regard for

[62] ibid [168].

[63] On the problematic nature of the group concept in sociological analysis see, e.g. RK Merton, *Social Theory and Social Structure* (rev edn, Free Press 1968) 364–80.

[64] ibid 171, 270.

the folk-analytic dichotomy urged here. In evaluating the Aboriginal evidence on its own, the *Milirrpum* Court acted as its own anthropological expert.[65]

Thus, even as we record our admiration of Mr Justice Blackburn's ruling on the admissibility of the expert testimony, the weight given to it by the learned Judge (and reasons for it) in arriving at the ultimate decision must be regarded as quite problematic.

III. The Doctrine of Communal Native Title: Did Aboriginal Peoples Have "Proprietary" Interests Recognizable at Common Law?

A. Introduction

The first substantial question arising in the case involved the plaintiff clans' contention that "pursuant to the laws and customs of the Aboriginal native inhabitants of the Northern Territory, each clan holds certain communal lands" and that under such laws and customs, "the interest of each clan is inalienable".[66] The clans concerned had, *inter alia*, the right of free occupation and movement in the lands; the right to exclude "others"; the right to "live off" their lands, including the rights to exploit its resources (including minerals) and finally rights of disposal of any "products in and of the land by trade or ritual exchange".[67] The establishment of these claims was essential to the plaintiffs' further claims concerning the recognition of their proprietary interests at Common Law in 1788. If the clans' interest in the subject land "were intelligible and capable of recognition by the common law", they were rights which (according to the

[65] This is once again evident in the Court's treatment of Professor Berndt's evidence concerning the antiquity of the clans' links with the subject land. Berndt testified that the explanation of some sacred sites of one clan found in the territory of another may lie in mythology as well as in history. Mythologically, such "enclaves" in another clan's "territory" could be explained (and is explained by Aboriginal peoples) by reference to the fact that the ancestral beings in their wanderings over indigenous lands generally left certain sacred sites belonging to a particular clan in some other clan's territory. Historically, the enclaves can be explained by a hypothesis of movement over time by one clan from their original land to some other area, retaining despite this movement its sacred sites in the original territory. Professor Berndt maintained strongly that the latter hypothesis does not "invalidate the original interpretation" (*i.e.* the mythological one). In cross-examination, Berndt maintained that the mythological explanation must be taken strongly into account as this was the Aboriginal explanation of the enclaves. Professor Berndt was here stressing the folk system. (*Milirrpum* Transcript, 1115-1117).

But the Court dismissed the expert's testimony on the ground that while the mythological explanation was the "soundest anthropological explanation" of the enclave phenomenon, the mere existence, the mere *possibility* of a historical explanation is of decisive import (*Milirrpum* [193]). Note that the mere possibility of the band having a core of membership from the particular clan was not, however, regarded as decisive (*Milirrpum* [169]).

[66] *Milirrpum* [151].

[67] ibid [152].

plaintiffs) "persisted and must be respected by the Crown itself and by its colonizing subjects, unless and until they were validly terminated".[68]

Appraisal of this contention required, *first*, some sort of understanding of the distinctive aspects of the indigenous social organization and the land-holding units within it. *Second*, it was also necessary to ascertain whether the plaintiff clans could establish on a balance of probabilities that their ancestors in 1788 had the same links with the areas of land which were now asserted by them. *Third*, it was of critical importance to determine whether the indigenous social organization did have some sort of law and legal system. For, the proprietary interests espoused by the clan would be "intelligible" and recognizable at common law in 1788 only if the indigenous social system contained a legal system within it. *Fourth*, it was necessary to ascertain whether Aboriginal peoples' legal system contained some conception of proprietary interests within it. *Fifth*, the identification of such interests required recourse to an explication of the notion of "property rights" or "ownership". Merely to enumerate these tasks is to take an inventory of formidable problems of fact and law which the Court had to confront and resolve at the outset.

B. Aboriginal Social Organization

1. Moieties and Clans

The judgment deals with the indigenous social organization in terms of three basic concepts, highlighted both by the Aboriginal witnesses and the expert anthropologists. The first concept "moieties", refers to two broad divisions which exhaust between them all things in the "physical and spiritual universes".[69] It is in the unchangeable, natural order of things to which belongs every human being, every clan, every animal and plant species, and every inanimate thing.[70]

But the concept of clans, which belong to either the Dua or Yiritja moieties, was the one most central to the indigenous social organization. As the learned Judge explains it, the clan is essentially a patrilineal descent group:

> Every human being has his clan membership determined at the moment of his birth, and it is that of his father. Each clan, and therefore each member of it, belongs to either the Dua or Yiritja moiety. Each clan is strictly exogamous. This has two aspects: not only can a person marry only one of another clan, but also only one of a clan of the opposite moiety. This results in there often being a special relationship between some particular pairs of clans, brought about by the fact that so many marriages have taken place between persons from each clan of the pair. Polygamy is normal. Upon marriage, a woman does not cease to belong to her own clan, though of course, her children belong to the clan of her husband.[71]

[68] ibid [149].
[69] ibid [166].
[70] ibid.
[71] *Milirrpum* [166].

But the clan was more than just a patrilineal descent group "with a spiritual linkage to mythological beings".[72] Language played an equally constituent role, as descent, in the indigenous social organization. Aboriginal peoples commonly used the term *"mata"* to indicate the tie of descent. But Professor Berndt submitted that they were also "highly conscious of" the classification of "clans" by language, commonly expressed by Aboriginal peoples as *mata.* Professor Berndt submitted that the "ultimately significant classification—the classification which linked the aboriginal to his territory"—was not either *mala* or *mata* classification, but a *mata-mala* classification.[73] The clan was thus a descent-language group. The *mata-mala* pair could be defined as:

> [T]hose who were of a certain language *and* of a certain patrilineal descent, as distinct from other *mata-mala* which was of, say, the same language but a different patrilineal descent. Furthermore, "each mata is usually linked with more than one mala and vice versa".[74] On the learned Professor's testimony, supported by the aboriginal witnesses, the "group linked to a particular piece of land" was always a *mata-mala* pair in the above-explained sense. Blackburn J found that the *mata-mala* pair is "the land-associated group".[75]

Mr Justice Blackburn proceeds to clarify that the association of the clan to land is fundamentally a "religious" one:

> It is not in dispute that each clan regards itself as a spiritual entity having a spiritual relationship to particular places or areas and having a duty to care for and tend that land by means of ritual observances. Certain sacred objects, called rangga, are at once symbols of the continuity of the clan, and tangible indications of the relationship between the clan and certain land.[76]

The learned Judge finds further that the clan conceived as a "religious entity" had "little significance in the economic sense".[77] As compared with tribes having a degree of internal organization with institutions for centralized decision-making such as that of the chieftainship, the Aboriginal clan had "no internal organization of its own".[78] Nor was the clan, unlike the paradigmatic "tribe", in a "direct economic relationship with, and in control over, a 'definable' territory".[79] In the absence of such an internal organization, it was notably difficult, according to His Honour, to make an accurate determination of the clan's relationships with "other social phenomena" such as the bands.

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[72] ibid [172].
[73] ibid.
[74] *Milirrpum* [172]-[173].
[75] *Milirrpum* [174].
[76] ibid [167].
[77] ibid.
[78] ibid.
[79] ibid.

2. "Clans" and "Bands"

While the spiritual nexus between the clan and the land was thus clear, its economic significance was in dispute. The clan as a clan was, in other words, not a "land exploiting group". This latter group was identified by the expert Aboriginal witnesses as a "band". The "band" comprised "various groups of aboriginals in various places about the land".[80]

Each group consisted of adult men, women, and children. Its composition was variable with time. Mr Justice Blackburn describes the activities of band as consisting in "hunting animals, obtaining vegetable food, getting materials for clothing and ritual observances and moving about from area to area as the economic exigencies required".[81] Changes in the composition of bands not only arose from natural causes or "economic exigencies" but also because of "ritual requirements at special sacred places at particular times".[82]

The plaintiffs argued that the band, thus constituted, was an "economic arm of the clan".[83] This was so because: *first,* the band normally had a core or a majority of members belonging to a specific clan and *second,* that "it was normal for the members of each clan to spend most of their time, in their several bands, on their clan territory".[84] Both these claims found ample support in the expert anthropological testimony, but according to the learned Judge, the testimony of the ten Aboriginal witnesses did not support either claim. His Honour finds that "neither the composition nor the territorial ambit of the bands was normally linked to any particular clan",[85] and in fact:

> [T]he clan system, with its principles of kinship and of spiritual linkage to the territory, was one thing and…the band system which was the principal feature of the daily life of the people and the modus of their social and economic activity was another.[86]

C. Some Findings on the Plaintiff Clans' Relations to "Their" Land

Although this dichotomy between "economic" and "religious" use of land by Aboriginal peoples is sharply drawn and pervasively employed in the judgment, the Court nevertheless considered evidence (both expert and lay) concerning the clans' relationship with the land. The following observations represent the aggregate of all relevant findings scattered in the judgment concerning the clans' relationship with the land.

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[80] *Milirrpum* [165].
[81] ibid.
[82] ibid.
[83] *Milirrpum* [171].
[84] ibid.
[85] ibid.
[86] ibid; but see Section II of this paper.

First, the Aboriginal evidence was consistent in vindicating the assertion that "any given part of the subject land can be attributed to a particular clan".[87] Blackburn J finds that "the aboriginals do…think of the subject land as consisting of a number of tracts of land each linked to a clan, the total of which exhausts the subject lands though the boundaries between them are not as precise in the sense in which boundaries are understood in our law".[88] The Solicitor-General, on behalf of the Commonwealth, contended in effect that the boundaries of land thus attributed to different clans were so imprecise and vague as not to be boundaries at all. Blackburn J in response adopts entirely the plaintiffs' argument that the need to delineate boundaries "in any system of law of European origin, or, for that matter, any system applicable to people who cultivate the soil"[89] was altogether wanting in the indigenous societies. His Honour ruled: "A boundary need be as precise as the users of the land require it for the uses to which they put the land".[90] This refreshingly functional approach is, however, not (as we shall see) characteristic of the judgment in the operative parts.

Second, the Court did not find upon evidence that the plaintiffs' predecessors, on the balance of probabilities, held the same areas of land in 1788 as the plaintiffs in 1935, when the Yirrkala mission was first established. The *mata-mala* pair was not impervious to change, and a number of mutations were probable. Professor Berndt, for example, had himself hypothesized that some *mata-mala* pairs were absorbed by more powerful groups.[91] Berndt also hypothesized that the presence of isolated sacred sites belonging to one moiety in the "territory" of another could be explained by fission of a large *mata-mala* pair.[92] Substantial movements over the history of clans from one area to another could not be ruled out. There was the almost paradigmatic situation: the Lamamirri clan land was at the time of the litigation being actually looked after by the Gumatj, since the clan was reduced to two old women, and was on the verge of extinction.[93] Similarly, the Rirratjingu-Wurulul *mata-mala* has "disappeared" but the men of "the Rirratjingu-Djamundar—the other *mata-mala* pair—seem anxious to stress the unity of the Rirratjingu *mata*".[94] Mr Justice Blackburn found the expert testimony inconclusive on the issue before him, which was a "historical" one, and felt that Professor Berndt tended to concentrate on "mythological" rather than "historical" factors.[95] The mythological account may be proper and adequate as an anthropological explanation, but the Court felt it was inconclusive as far as the determination of

[87] *Milirrpum* [180], [272].
[88] ibid [179].
[89] ibid [176].
[90] ibid [271].
[91] ibid [191].
[92] ibid [191]-[192].
[93] ibid [189].
[94] ibid [197]-[198].
[95] ibid [195].

probable links between the present clans and their predecessors in relation to the subject land was concerned.

Third, the Court does acknowledge that "the system, the pattern, of aboriginal relationship to land has been an enduring one probably for centuries" but that "*within* that system or pattern there have been changes of various kinds…"[96]

Fourth, the evidence showed that:

i. "approaches to sacred sites were made only with the knowledge of the clan Concerned";[97]

ii. "*participation* in the ritual was or might be by the invitation of the clan concerned";[98]

iii. when an individual went to a piece of land "related to the clan of the other moiety, he would take care that a responsible person of the appropriate clan was informed". This had special relevance to the subject land "which is nearly linked to one of two clans of opposite moieties—the Rirratjingu and the Gumatj";[99]

iv. the above custom (of informing the appropriate person of the clan of another moiety) was "at least doubtful" in its application to a "man of one clan" entering the "land of a clan belonging to the same moiety";[100]

v. on the land of "a man's own clan", there were "no restrictions of any kind" save those relating to access to sacred sites by uninitiated persons;[101]

vi. the "custom was not to be alone in the territory of another clan (or possibly moiety) without the knowledge of some responsible member of that other clan or moiety…";[102]

vii. such knowledge did not amount to "seeking permission which might or might not be granted";[103]

viii. while members of eleven plaintiff clans did "use" the land belonging to the two other plaintiff clans (Rirratjingu and Gumatj), it was not proved that

[96] ibid.
[97] *Milirrpum* [181].
[98] ibid.
[99] *Milirrpum* [182].
[100] ibid.
[101] ibid.
[102] ibid.
[103] ibid.

such use was by the clans as such (except perhaps for ritual purposes) and not by individuals.[104]

D. The Aboriginal Legal System

One of the main arguments for the defendants was that the posited rights of clans were not "rights" at all, since "in the aboriginal world there was nothing recognizable as law at all".[105] Although not so stated, this sort of argument does indeed show considerable jurisprudential sophistication in that it entails the proposition that to establish the clan's proprietary interests, there has first to be an established legal system. HLA Hart some time ago reminded us that the statement "X has a right" is true if there is, in existence, a legal system.[106] But this jurisprudentia1 sophistication is comp1ete1y at odds with the reasons proposed for the non-existence of the Aboriginal legal system. The Solicitor-General argued that "before any system can be recognized by our law as a system of law, there must be not only a definable community but also some recognized sovereignty giving the law a capacity to be enforced".[107] Predictably, the defendants argued that the Gumatj and Rirritjingu clans can have no right to law because "there was no authority…capable of enforcing them".[108] Equally predictably, but at this stage betokening a rather startling lack of any grounding in legal theory, the defendants analogized the indigenous system with international law—"the nature of which as the law has often been challenged on the ground that there is no authority capable for enforcing its rules".[109]

It testifies (with respect) to the conscientiousness and perceptiveness of Mr Justice Blackburn that he finds no difficulty in negating this contention. Insofar as the notion of law had to be related explicitly to that of sovereignty, the learned Judge pointedly asserts that the "inadequacy of the Austinian analysis of the nature of law is well-known".[110] His Honour prefers to define law, *if* a definition was necessary, in terms of a "system of rules of conduct which is felt as obligatory by the members of a definable group of people" to the definition of law as "a command of the sovereign".[111] Obviously, if Blackburn J had rested his conclusions on this matter at this point, his definition would have attracted a number of criticisms, including the point that such a definition does not enable us to distinguish, with sufficient sharpness, between rules of morality and legal rules. And the Solicitor-General's contention was that whatever

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[104] *Milirrpum* [183].
[105] ibid [266].
[106] HLA Hart, 'Definition and Theory in Jurisprudence' (1954) 70 Law Quarterly Review 49.
[107] *Milirrpum* [266].
[108] ibid.
[109] ibid.
[110] ibid.
[111] ibid.

rules of conduct the Aboriginal peoples did have, they were *not* legal rules backed by secular "outward" sanction.

But Blackburn J does not have to rely on definitional fiat. His Honour prefers a "more pragmatic approach", and finds that a study of the evidence in this case:

> [S]hows a subtle and elaborate system highly adapted to the country in which some people led their lives, which provided a stable order of society and was remarkably free from the vagaries of personal whim or influence. If ever a system could be called "a government of laws, and not of men", it is that shown in the evidence before me.[112]What is shown by evidence is…that the system of law was recognized as obligatory upon them by the members of a community which, in principle, is definable, in that it is the community of aboriginals which made ritual and economic use of the subject land.[113]

Similarly, the absence of sanctions and machinery for enforcement does not amount to the absence of law itself in His Honour's view:

> The specialization of functions performed by the officers of an advanced society is no proof that the same functions are not performed in primitive societies. Law may be more effective in some fields to reduce conflict than in others, as evidently, it is more effective among the plaintiff clans in the field of land relationships than in some other fields. *Mutatis mutandis*, the same is patently true of our system of law….Great as the differences are, the differences between that system and our system are, for the purposes in hand, differences of degree.[114] These memorable observations may not completely escape criticism,[115] but they enshrine a luminous understanding of the nature of law which no lawman can afford to overlook.

E. Are Plaintiffs' Interests Recognizable and Proprietary?

This question was, in fact, at the heart of the case. For the common law to recognize, at or after the Australian settlement in 1788, there must be something it *could* recognize. Even if it can be held that the Aboriginal peoples in the subject land had a legal system at all relevant times, as indeed it was held, this holding in itself could not answer the further question which needed to be answered: did the Aboriginal legal system recognize interests which can justifiably be characterized as "proprietary" interests?

An answer to this question, in turn, required recourse to some explicit criteria by which certain interests could be regarded as proprietary. Such criteria were not, according to Mr Justice Blackburn, to be found in either the plaintiff's or the

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[112] *Milirrpum* [267].

[113] ibid.

[114] *Milirrpum* [268].

[115] One may wonder whether it is at all possible to identify a system of norms as a legal system solely by a study of evidence. Recourse to a concept or definition of law is analytically entailed in such an enterprise. The learned Judge propounds a definition and uses it in the evaluation of the evidence, but at the same time prefers to emphasize that his decision here is based solely or pre-eminently on evidence.

defendant's contentions. The Solicitor-General's contention (noted briefly earlier in this paper) was that the boundaries of various clan-lands or "territories" were imprecise and vague. The learned Judge, we may recall, made short shrift of this argument on the basis that the boundaries of land need only be definable with such "precision as the users of the land require for the uses for which the land is put".[116] Nor did the Judge uphold the further contention of the Solicitor-General that the Aboriginal witnesses, whether or not members of the clan whose land was being considered, "should have been able to say what these areas or sites were, and should not only have been unanimous but word-perfect" (*i.e.*, designate without verbal divergence the same sites or areas as belonging to a particular clan).[117]

The Court found this argument unconvincing for it entailed the proposition that "an oral register of the title must be repeated in full detail by each witness".[118] This sort of thinking was fallacious insofar as it implied that "there can be no rights of property without records or registers of the title".[119]

The three arguments advanced by the plaintiffs were also unproductive of any criteria for identifying proprietary interests. First, it was urged that Aboriginal peoples "think and speak of the land as being theirs, as belonging to them".[120] Blackburn J finds this argument so unhelpful as to say that "it begs the question" before the Court. There was "little" evidence of the significance of linguistic usages of Aboriginal peoples before the Court. The phrases (such as "land of Riratjingu", "my country" or "my land") were consistent with ownership; but as the learned Judge rightly emphasizes, the "possessive pronouns and the word 'of' are used in the widest variety of meanings"[121] not *necessarily* implying proprietary interest. The plaintiffs' argument merely amounted to saying that Aboriginal peoples "think and speak of the land as being in close relationship to them".[122] The question, however, was: was that close relationship proprietary in nature?

The second argument of the plaintiffs indicated that those who, for example, visited the Gumatj and Rirratjingu land acknowledged it as belonging to the Gumatj and Rirratjingu, making no claim over it. Nor were there any disputes over land. The learned Judge agrees that such disputes were most infrequent but feels it necessary to hold that "it only goes to show that whatever the relationship of the clans to the land is, is not disputed by other clans".[123] Precisely that "whatever" of the clan relationship

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[116] *Milirrpum* [271].
[117] ibid. Blackburn J here is overstating the Solicitor-General's contention which was not that Aboriginal peoples were not word-perfect but that "they were too far from being so".
[118] *Milirrpum* [272].
[119] ibid.
[120] *Milirrpum* [269].
[121] ibid.
[122] ibid.
[123] *Milirrpum* [260]-[270].

to the land was to be determined by the Court. Nor, finally, was the argument from mythology (that spirit ancestors had endowed the clans with rights in land) persuasive in the light of the Aboriginal evidence. To say that land was "given" to each clan "was to extract from the myths of creation only one part and regard it in isolation".[124] For, "the spirit ancestors created all things–the land, the clans, the sun, the stars, the animal and vegetable kingdom and the sacred rituals and set them all in a proper relationship".[125] The learned Judge hesitates to "venture into this field", feeling at the same time that it was "unnecessary" to do so.

Accordingly, Blackburn J holds that "the proper procedure is to bear in mind the concept of property in our law, and in what I know of other systems which have the concept…and to look at the aboriginal system to find what there corresponds to or resembles property".[126] Right to property "in its many forms, generally implies the right to use or enjoy, the right to exclude others and the right to alienate".[127] It was not essential, in His Honour's view, that "all these rights must co-exist before there can be a proprietary interest" or to deny "that each of them may be subject to qualifications".[128]

Applying the first criterion, the Judge observes: "It makes little sense to say that the clan has the right to use or enjoy the land".[129] This was so because the land-exploiting group was a social unit which was properly described as a *band* and not a clan. The clan's right to use and enjoy the land extended only to the performance of ritual ceremonies on it.

The clan's right to exclude others "was not apparent". In fact, Blackburn J finds that it was denied by the third Plaintiff, Daymbalipu. He claimed in paragraph 23 of the statement of claim that members of the *eleven* clans which he represented "are sharing and at all material times have shared the use and benefit of the said land with the Rirratjingu and Gumatj clans", and that the clans are there in the said land "with the consent and the approval of the Rirratjingu and the Gumatj clans…."[130] The former statement was apparently accepted as true and the latter statement was held not to be borne out by evidence. The right to alienate, recalls the Judge, "was expressly repudiated by the Plaintiffs in their statement of claim".

Accordingly, the Judge holds that "there is so little resemblance between property as our law, or what I know of any other law, understands that term, and the claims of the Plaintiff for their clans, that…those claims are not in the nature of

[124] ibid [270].
[125] ibid.
[126] *Milirrpum* [272].
[127] ibid.
[128] ibid.
[129] ibid.
[130] *Milirrpum* [183].

proprietary interests".[131] The Judge concludes that while the Aboriginal legal system is a recognizable system of law, it fails to provide "for any proprietary interest in the plaintiffs in any part of the subject land".[132]

Any criticism of the Court which faults it for adopting a western or a "Eurocentric" concept of property in appraising indigenous claims would be altogether too facile. The plaintiffs urged the Court to engage in precisely this sort of appraisal. The interest of each member of the clan in the "communal" land was claimed to be "proprietary" by paragraph 4 of the statement of claim; likewise, the statement listed, among the incidents of such interest, the right to use and enjoy the land and the right to exclude others. Moreover, these interests were claimed to be proprietary within the meaning of Section 5 (1) of the Lands Acquisition Act 1955-1966 which defines "interest" (but *not* "property") as "(a) legal or equitable estate or interest in land; or (b) a right, power, privilege over, or in connection with, the land".[133] In the face of this sort of contention, it was simply not open to the Court to adopt criteria other than these of the English law. Nor, indeed, should we expect of the Court to embark on an intimidating exercise in comparative jurisprudence to arrive at a formulation of the "core" of the notion of "property". It took over twenty years for a team of dedicated scholars from all over the world to distil a common core of ideas and techniques on the notions of offer and acceptance in contracts, and the *cognoscenti* still debate the extent of what was thus achieved.[134]

IV. Some Reflections on the Relevance of Analytical Clarification to the Appraisal of Communal Native Title

The context of pleadings, and the virtual impossibility in a litigious situation of distilling a common core of the notion of "ownership" from the legal systems of the world, must control any critical evaluation of Mr Justice Blackburn's explication of the "incidents" of proprietary interests. The following evaluation of this aspect of the judgment attempts to highlight the problems inherent in these criteria and the attempted application of these to the *Milirrpum* situation.

A. Distinction Between "Having" a Right and "Exercising" a Right

It must be said that the Court fails to make the crucial distinction between "having" a right and "exercising" it. This distinction is essential to clearly think about rights in general. To say that X has a right is to say (in strict Hohfeldian sense) that Y has a duty.

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[131] *Milirrpum* [273].

[132] ibid.

[133] *Milirrpum* [273]. The Court's approach to this aspect. of the plaintiff's contention is far too summary; this is perhaps justified in view of the holding that the Aboriginal legal system did not recognize any "proprietary interest". One wonders how different an outcome might have been if the statutory formula had been used as a guide for identifying the constituent elements of proprietary rights.

[134] RB Schlesinger (ed), *Formation of Contracts: A Study of the Common Core of Legal Systems* (Oceana Publications 1968).

The jural co-relative of a right in one legal person is a corresponding duty in another. But statements such as these are rolled-up ways of saying a number of things. As HLA Hart, following Benthamite approaches to the definition of legal concepts, rightly stressed the proposition "X has a right"; in order to be meaningful, must be predicated upon (i) the existence of a legal system; (ii) existence of rule or rules within such a system obligating Y to act, or abstention; and (iii) existence of further rules such as to make Y's obligation to act or abstinence dependent in law upon the choice of X to do whatever he is entitled to do under the rules "or alternatively until X…chooses otherwise".[135]

But the statement "X has a right" also entails the further proposition (which Hart did not make explicit) imputing some sort of notional understanding on the part of X to make a certain demand or claim of behaviour from Y, under the protection of a legal system to which both belong. Unless a right-holder has some such understanding, the choices that activate the obligations of the duty-bearer cannot be made at all. This notional understanding of one's entitlement does not need to be as complex and sophisticated as that of the lawyer and the judge, who specialize in the art of legal interpretation, but there has to be some sort of understanding. The statement therefore that "X has a right" must in addition to the conditions stipulated by Hart, have reference to a distinctive kind of awareness on the part of the right-holder consisting in the notion of legitimate claim over the behaviour of others.

Exercising a right naturally presupposes *having* it but is not—equally, naturally—the same as having it. The right of A, owner of Blackacre, that no one shall enter his land without permission is a right that consists of an innumerable series of claims against all members of a community. The *exercise* of this right against B is not the same thing as *having* a right in relation to C to Z. Nor is the exercise of his right against B, here and now, the same as *having* a right against B for all such times as A continues to "own" Blackacre. To *have* a right is to nurse a *potential* jural relation; to *exercise* it is to bring forth an *actual* legal relation.

Having a right presupposes a degree of cognition on the part of the right-holder, whereas *exercising* a right entails legally relevant behaviour. Legal systems may vary in their approaches to the relationship between having a right and exercising it. Thus most developed legal systems (having Malinowski's three "Cs" (Codes, Courts, and Constables) provide that at certain points a very great tension between simply having a right and *not* exercising it may also lead to the legal consequence of one not having the right at all (e.g. prescription). Such legal systems may also provide the more limited consequence of denying the enforcement of rights after a certain period (i.e., laws of limitation of actions).

[135] See Hart (n 106).

But it is equally, if not more, important to stress that legal systems need not contain such rules at all. The tension between having a right and not exercising it may not be seen by some legal systems as a problem requiring solution through provision of controlling legal norms. For sound policy reasons or even through sheer inertia, the legal system may not respond to a problem, having in the first place perceived it as such. In a way, the relationship of concomitance between having a right and exercising it at a certain point is an outcome of: (i) the level of legal and societal evolution; and (ii) the overall values (e.g. mobility of resources, vigilance) underlying a given legal system.

The rule that prescription extinguishes the rights of an owner, in systems which recognize it, is obviously a rule arising out of the pursuit of certain values by a society's legal system. But even such a rule cannot be construed strictly as imposing a *duty* upon the right-holder to *exercise* the right that he *has*. All that such a rule does is to attach certain legal consequences which makes non-exercise of a right, under certain conditions, incompatible with having a right. Rules of prescription provide one way of ensuring transference of certain types of proprietary interests.

If this distinction between *having* a right and *exercising* it is analytically tenable, then inadvertence to it in the *Milirrpum* case constitutes one of its principal vulnerabilities. A number of evidentiary points recognized in the judgment as valid testify to the clans' *having* a right to use and enjoy the clan-land. The clans' right to use and enjoy the land for religious and ritual purposes is frequently acknowledged in the judgment.[136] The judgment also acknowledges as proved upon Aboriginal evidence (noted earlier in section III(C) of this paper) that: (a) that Aboriginal peoples "do think of the subject land as consisting of a number of tracts of land each linked to a clan, the total of which exhausts the subject land…"; (b) there was a notable degree of consistency in attribution of land to each specific clan; (c) the relationship of the clan to such lands is rarely disputed by other clans; (d) the system of "aboriginal relationship to land" was an enduring one, despite important sub-systemic changes; (e) Aboriginal peoples recognize as proper and valid certain ways in which land belonging to another clan can be acquired temporarily (through guardianship, as in the Lamamirri case) or permanently (as through fusion or fission in *mata-mala* pairs).

Mr Justice Blackburn finds it difficult to accept the proposition that clans *as such* had the right to use and enjoy the land for secular purposes. His Honour holds that the bands, as a matter of fact, used the "clan-lands" and that, as a matter of law, members of *all* plaintiff clans did have a right to thus use and enjoy the land of each and every plaintiff clan. But on the distinction between *having* a right and exercising it, the proposition that members of all plaintiff clans have a right to use and enjoy every other clan's land (in addition to their own) is not necessarily conclusive on the issue whether clans as such have the right of use and enjoyment of its own land. The precise

[136] *Milirrpum* [272], [182], [171].

relevance of other Aboriginal peoples' right to use and enjoy the land of a particular clan to the similar right of that clan *as such* must be sought and found in the Aboriginal legal system. Did that system provide that clan A's *having* a right to use and enjoyment of its own land cannot exist with the similar rights of *individual*s from clans B to Z? Did that legal system provide that clan A's *having* such a right should be extinguished if for a designated period a certain number of individual members of clan B *exercised* their rights upon clan A's land? Or that clan A's *having* such rights but not actually *exercising* them and indigenous individuals' having and exercising them extinguished the former's entitlements at a certain point of time? If so, in whose favour did such extinction occur? And what social policies were served by such rules?

Mr Justice Blackburn does not raise these questions because the distinction between *having* and *exercising* rights was not canvassed and did not emerge at the decision-making phase. But, with respect, it should have. If Counsel had perceived this distinction, appropriate answers could have been obtained in the examination of the Aboriginal witnesses, notwithstanding the extraordinary difficulties of communication surrounding such examination. If the Court had become aware of the distinction at the stage of composing the judgment, it might have been led to a confession of shortfalls in evidence before it and a much more tentative decision on this aspect. In fact, given the conscientious approach of the learned Judge, we might have justifiably expected a statement of difficulties at arriving at a judgement on this aspect.

But this does not happen. What did happen was a transference, albeit unconscious, of western legal concepts and social values to the appraisal of an indigenous legal order, a consequence that Mr Justice Blackburn clearly wished to avoid.

To proceed on the basis that "western" standard of use and enjoyment of land as a constituent element of the concept of property should be employed in the instant case was one thing. But to say that the indigenous legal systems should, therefore, follow certain patterns of extinction and transference of proprietary interests is another. An intemperate critic might be moved to say of this latter exercise that it is not merely blatantly Eurocentric but also a manifestation of high-handed juristic imperialism. And such a critic would have a valid point.

B. The Distinction Between Entitlements of Clans as Clans and of the Individual Members of the Clans

Mr Justice Blackburn holds, as already noted, that the individual members of all clans have a right to use and enjoy (for secular purposes) not merely the land of their own clans but also the lands of all other clans. But His Honour prefaces this observation by saying: "It makes little sense to say that the clan has the right to use or enjoy land".[137]

[137] *Milirrpum* [272]. Also see p. 183.

This must mean that it is senseless to speak of clans having the right of secular use and enjoyment as a *group*. At the same time, the learned Judge is prepared to concede that the "clan *as such*" has the right to use and enjoy its clan land for ritual purposes. With respect, this is to talk in riddles. Either it makes sense to talk of the clan *as such* having a right of this nature or it does not. It cannot be maintained consistently that while the clan-entity is incapable of having secular rights of use and enjoyment of its land because it makes "little sense" to say so, one can speak sensibly of clans' right *as a clan* to the sacred user of the land. The entire basis of the plaintiffs' claim was precisely that the posited proprietary interests of clans *as* clans were infringed by the defendants.

This inconsistency is compounded by an earlier observation in the same part of the judgment where His Honour states:

> I do not think that anything turns on any possible difference between the rights of the clans and the right of the individual members of the clans. None was suggested in argument. Moreover, the evidence shows that at any rate as between initiated males, no member of a clan makes any claim different from, or adverse to, that of any other member.[138]

This observation must mean at the very least that as regards, say, the Gumatj clan's right to use and enjoy land for secular purposes and its members' similar right there is no difference at all. But to say so is in effect to concede that it makes as much sense to speak of such rights of clans *as such* as it does to speak of the rights of its members. And the plaintiffs were in effect claiming protection of this complex of rights.

This inconsistency is not inconsequential. For, properly appreciated, the proposition that the members of the Gumatj clan have "rights" to use and enjoy Rirratjingu land is not the same at all as the proposition that the Gumatj clan *qua* clan has such rights over Rirratjingu clan land. The "rights" of the individual members of the Gumatj clan remain individual rights even if each member of the Gumatj clan had this right and exercised it. To make this clear, let us suppose that all individual members of AULSA have rights over the land on which the famous Tasmanian Casino is being built. To say that they all have rights over this site is not to say that AULSA as a group has such rights. The issue before Blackburn J precisely was whether clans as such, as group entities, have the right to use and enjoy the clan land. To say that that issue does not make sense is, with respect, to fail at the very first analytical threshold. This failure is compounded by the willingness to treat the "clan" as an entity in the sacred context but not in the secular.

But it may be asked, what difference to the outcome on this issue would it have made if this inconsistency had been avoided? The answer is that the learned Judge would have had to ascertain whether the Aboriginal legal system invested in all plaintiff clans as *clans* the right to secularly enjoy and use every other clans' land, in addition to

[138] ibid [262].

its own. In other words, did the Aboriginal legal system in effect contain norms positing (or can such norms be reasonably inferred), for example, that the Gumatj clan *qua* clan had the same rights of secular uses and enjoyment of Rirratjingu land as it had over its own Gumatj land?

To answer the question in the affirmative is also to say that Aboriginal law made no distinction at all, on the issue of secular uses of land, between the claims of the Gumatj clan on Rirratjingu land and *vice-versa*. This in effect is what Mr Justice Blackburn holds, without, however, at any stage asking the above question directly. This indirect holding is, however, not supported by any explicit data arising from the evidence, as reflected at any rate in the judgement. In fact, as already enumerated in the preceding section (A) of this part of the paper, a whole cluster of evidentiary points acknowledged as valid in the judgement, suggest rather the contrary.

How can it be maintained in the light of this sort of evidence that the Aboriginal legal system (to repeat our question) made no distinction at all, on the issue of secular use of land, between, say, the claims of the Gumatj clan, *as a clan*, over Rirratjingu land and *vice-versa*? But precisely that would have to be said if one did not distinguish carefully between the rights of clans as collective entities and rights of *members* of the clans over another clan's land.

C. Some Analytical and Sociological Problems Associated with the Notion of Clan Entitlements to Land

The difficulty which Mr Justice Blackburn felt in attributing to clans the right of secular use and enjoyment may not wholly be without some intuitive foundation, not articulated in the judgement. This intuitive feeling can be canvassed as follows.

If we use the term "right: *stricto sensu* it, being a relational term, entails as its jural correlative the notion of "duty". The proposition that, say, the Gumatj clan as a clan has the right of secular user and enjoyment of the Rirratjingu clan land must imply that the Rirratjingu clan as a clan has corresponding duties of non-interference with the exercise of the Gumatj clan rights. The same will hold *mutatis mutandis* if we reverse the proposition and assert that the Rirratjingu clan as a clan has corresponding rights over the Gumatj clan land.

Assume now that both the Gumatj and Rirratjingu clans have the right to secular use and enjoyment of their respective lands (as indeed seems to be acknowledged in evidence). This proposition entails that other clans *qua* clans have a corresponding duty not to interfere with the Gumatj clan's *exercise* of its rights.

It is clear that as between these two clans, two discrete sets of legal relations are involved. It is also clear, based on the distinction made earlier between *having* and *exercising* a right, that there is nothing notionally incomprehensible about a legal system creating analytically opposed legal relations. Legal systems can thus

institutionalize conflict, with or without providing norms or specialized institutions for their resolution.[139]

The analytically conflicting right-duty relations thus created could cause several problems when the rights are sought to be *exercised*. Thus, in our present example, if twenty members of the Gumatj clan come to dig yams (as representing the clan as such) on the Rirratjingu land in area X, at a time when twenty members of the Rirratjingu clans (also representing the clan) want to extract yams on their own land in area X then, strictly speaking, neither party will be *justified* in *exercising* its rights. This is so because, in each case, the exercising of a right would also be a violation of a duty. If the Gumatj seek to exercise their clan-right on Rirratjingu land in the above situation, the Rirratjingu will be under a corresponding duty not to extract yams at the same time in the same area; but by the same token, the Rirratjingu clan has a right to use its own land in this manner, and the Gumatj are under a duty not to interfere.

This extraordinary situation must provide one major intuitional foundation for saying with Mr Justice Blackburn that it makes "little sense" to speak of clans as such having rights or that the clans had no rights of use and enjoyment. But this conclusion does not necessarily follow, nor is it analytically correct. The correct analytical formulation of the situation here is not that neither clan is *entitled* to extract yams but that neither clan can justifiably *exercise* its rights in this specific situation.

But, if the above analytical formulation is unacceptable, there are other, more traditionally accepted ways by which the conclusion reached by Mr Justice Blackburn could be properly avoided. Thus, it might be said that, while as a general rule both the Gumatj and Rirratjingu clans have as such right to secular use and enjoyment of their own and each other's lands, the legal relations involved in our hypothetical situation may not be right-duty relations at all. In other words, one would have to presuppose a rule of Aboriginal law prescribing: "Each aboriginal clan shall be entitled to use and enjoy (for secular purposes) the land of each other clan; provided, however, that no clan shall authorize its members to do so when the clan to whom a particular land belongs is *actually* using and enjoying a particular tract of land belonging to it".

The presupposition of such a rule is merely an analytical exercise; whether such a rule actually exists is a matter of Aboriginal testimony and the judicial evaluation of it. But the search for such testimony and its subsequent evaluation cannot simply take place if we do not entertain this sort of presupposition in the first place. There are some very good reasons for making such a presupposition in addition to eliciting proper evidence, but certainly the most decisive among such reasons is the virtual impossibility of arriving *at any decision at all* on the issue as to whether clans as such have any rights at all to secular uses of their land and of the lands of other clans as well.

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[139] See MR Kadish and SR Kadish, 'The Institutionalisation of Conflict: Jury Acquittals' (1971) 27 Journal of Social Issues 219.

The other good reasons for wanting to presuppose such a rule are sociological in a broad sense. If we were to accept the proposition that both the clans as such have right *stricto sensu* in the hypothetical situation, what will be the probable resultant behaviour patterns encouraged by such a rule? The following behavioural patterns come readily to mind; but there might be other, less obvious, ones: (i) neither clan will be able to claim that it is proper for it to dig yams, which each presumably needs; (ii) both may do so, with varying degrees of conflict and tension, depending upon the levels of scarcity of resources and intensity of needs; (iii) the more powerful among them prevail; or (iv) if both are evenly matched in terms of power, the resources they both need remain "untouchable"; or finally (v) in the exercise of conflicting entitlements, norms of accommodation and reticence may develop.

If the Aboriginal legal system is to avoid institutionalization of conflict, it ought to avoid also incentives to and tolerance of behaviour entailed in propositions (i) to (iv), and must give incentives for the development of norms of accommodation and reticence in mutual enjoyment of the entire territory. Our presupposition of the above-formulated rule is only one way of concretizing such norms of reticence and accommodation.

Any evaluation of Aboriginal testimony concerning the existence of such a rule, supporting the development of reticence-accommodation norms must necessarily involve a degree of superimposition of the "Western" ways of thinking on a wholly different legal civilization. The scope of such intrusion is very substantially limited, however, by rigorous analytical procedures here canvassed as essential. These procedures enable us to discover, first of all, the authentic Aboriginal policies and rules (always bearing in mind the great difficulties of the communication situation) and secondly, to make a choice among conflicting indigenous policies and rules in terms of *their* overall social context. Thus, it is certainly conceivable that a food-gathering, non-agrarian community, having law but little (if any) governmental organization, may encourage conflict of behaviour consistently on policy grounds perceived by outsiders as rational. But is it possible that the Aboriginal legal system could have thus provided? Let us recall that Mr Justice Blackburn was moved to characterize this system as a "subtle and elaborate system, *highly adapted to the country in which some people led their lives which provided a stable order of society*…."[140]

How can a legal system, on the one hand, institutionalize conflict, provide no effective legal means for its resolution and yet, on the other, provide "a stable order of society?" And certainly, the *Milirrpum* Court does not characterize the indigenous legal system as it does by way of a mere rhetorical flourish. In fact, the learned Judge's affirmation of the Aboriginal legal system is based on the evidence before the Court. Thus, the reference to a "stable order of society" to which the Aboriginal legal system contributed is, for example, significantly linked with the finding that disputes

[140] *Milirrpum* [267] (emphasis added).

concerning the subject land were infrequent, to the point of being rare, among the plaintiff clans.

The significance of this finding, in the present submission, is precisely that a complex structure of "accommodation–reticence–deference" norms was nurtured by the Aboriginal legal system and rendered unnecessary for this purpose any set of specialized agencies for dispute-settlement. That such a normative structure should perform such a task for centuries may seem to us startling at first sight but this initial "culture shock" will not survive careful reflection. Several factors point to an explanation of such a phenomenon. Large tracts of land were occupied by relatively few people. Division of labour, though complex, was still rudimentary. Scarcity of resources for sustenance was matched by a moderation of needs. The sharpness of the classification of clan units into two moieties was blunted by exogamous marriage and polygamy, just as the constituent element of patrilineal descent was balanced in some ways, by the constituent element of language. Above all, the common stock of myths, folklore, legends, and the distinctive role of these and of rituals must have contributed eminently to the development of the "accommodation-reticence-deference" normative structure.

It is not my intention to suggest that the Aboriginal social organization knew *no* conflict and that its legal system provided *no* means of handling any or all conflict thus arising.[141] Absence of disputes concerning land, explainable by reference to above sorts of factors, does, however signify that as regards land use, the social organization minimized the potential for conflict and the legal system while reflecting, also reinforced, this minimization.[142] To take the view that the absence of land use disputes is not relevant to the task of determining whether the posited Aboriginal interests in land were "proprietary" is, in the light of these considerations, akin to saying (with respect) that a study of symptoms is not relevant to the task of diagnosis.

D. The "Right" of Exclusion

As noted earlier, the Aboriginal evidence did not show that it was "characteristic of the clan's relationship to a particular land"[143] for any other "clan" or its member to seek prior permission for use of the clan's land, except in the realm of the sacred. The Rirratjingu and Gumatj lands were, in fact, used not just by members of the eleven plaintiff clans, but, also by members of many other clans. Mr Justice Blackburn accordingly holds as a matter of finding on Aboriginal law that "the clan's right to exclude others is not apparent".[144] The "greatest extent to which this right can be said

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[141] On some aspects of conflict in Aboriginal societies see, *e.g.* LR Hiatt, *Kinship and Conflict: A Study of an Aboriginal Community in Northern Arnhem Land* (ANU Press 1965) 103-126.
[142] *Milirrpum* (n 115), see the quotation from the judgment in the text.

[143] *Milirrpum* [181].
[144] *Milirrpum* [272].

to exist is in the realm of the ritual".[145] And even so such ritual "exclusion" was never a complete exclusion from the clan territory. The exclusion was "only from sites".

This holding was a complete answer to paragraph 5 (b) of the plaintiff's statement of claim that the plaintiff clans' communal interest in the land included among its incidents such a "right" of exclusion. One can say with the benefit of hindsight that such a claim ought not to have been put forward in the first place. But it remains true to say that even if such a claim were not pressed, the learned Judge would, in any case, have regarded the right of exclusion as a constituent element of the concept of "property".

Be that as it may, the distinction between *having* a right and *exercising* a right again become crucially relevant. The evidence, as appraised in the judgment, shows that when Aboriginal peoples went on the land of another clan and moiety, it was customary to inform "a responsible member" of that clan or moiety. This act of information did not amount to the act of seeking or receiving permission. All that the customary practice established was the essentiality of knowledge, not of prior permission or subsequent ratification.

Even so, this practice is not without any significance. It must at the very least indicate a norm of deference to elders of a clan whose land was used or visited. And this norm must be related to the internal recognition among Aboriginals that certain lands belonged to certain clans. It is arguable that this norm of deference can be regarded as a legal norm, indicating an awareness of legal entitlements to the land of a clan whose land was being visited or used.

But this norm would be important in the present context only if it testified to the more precise right of the exclusion claimed by the plaintiffs. Certainly, it is arguable that the *absence* of evidence of actual acts of permission or refusal does not in itself, without more, negate the right to exclusion.

There are two ways in which it can be argued that this norm of deference is relevant to establishing the plaintiffs' contention. It might be said, first, that at least as regards to use of land belonging to a different "clan-moiety", the custom of providing information was only one way of testifying to the right of exclusion that the visited clan *had* in the land. The absence of any adverse action by the visited clan (i.e., the clan whose land Aboriginals, at least from another "clan-moiety", use or visit) signified tacit approval. This is only a shorthand way of saying that although both the visiting and visited Aboriginal peoples were conscious of the latter clans' right of exclusion, the visited clan did not *exercise* this right. Not to exercise the right of exclusion is not necessarily to have that right, unless and until the relevant legal system contains a rule stipulating extinction of a right when it is not exercised for a long period of time.

[145] ibid.

The Court fails to ask the all-important question: Did the Aboriginal legal system so provide? The question to be put to Aboriginal witnesses on this point was not whether they had to seek permission but, rather: "Why did they feel that the visited clan elders should be informed?". Was it because they felt they ought to inform visited clan-elders? Why did they feel this way? Was there a sense of binding obligation? If the answer to this last question was in the affirmative then, it would have been reasonable to attribute a shared consciousness to the visited and visiting clans concerning the "rights of exclusion".

The other, and second, way in which one can establish the rights of exclusion is simply to say that it is inappropriate to speak of rights of exclusion altogether. The appropriate Hohfeldian category here is not "right" but "power". The power in A to exclude others, in the Hohfeldian sense,[146] must entail liability in B to be excluded at the will of A. But A's power to exclude B from his land could be accompanied by A's privilege to permit B to enter and use A's land, creating no right in B to enter. Similarly, A's power to exclude B could be consistent with A's right to exclude B from his land and B's duty not to enter upon A's land. We cannot infer, for example, from the mere fact the thirteen plaintiff clans and all Aboriginal clans and individuals use and enjoy the Gumatj and Rirratjingu lands, that the latter do not have "right" or "power" to exclude the former. The evidence of such use and enjoyment cannot betoken the range and type of legal relations involved; these must come forth from the concerned legal system.

The evidence that no permission was sought or given is ambiguous and needs interpretation. Mr Justice Blackburn prefers to interpret it to mean that this evidence conclusively establishes that the clans had no "rights" of exclusion. But one can equally well construe the evidence to mean that the proper analytical relationship thus revealed between the Gumatj and Rirratjingu clans was one of privilege–no right, rather than right-duty relationship. Both these relationships are analytically open to us once we reformulate the notion of "right" to exclude into that of "power" to exclude. And the point here is that exercise of power by the creation of privileges in favour of other Aboriginal peoples to visit one's clan land does not affect its range and potency, *absent* a contrary rule of Aboriginal law to that effect. If it were otherwise, we would indeed have to assert that the visited clans had the *duty* to exercise their exclusionary power and, further, that certain Aboriginal peoples had a right corresponding to that duty.

If the exclusionary right is thus formulated as exclusionary power then, the following type of questions need answers in the Aboriginal testimony: "Did the visited Aboriginal clan feel that it had no alternative but to let persons from other clans visit, use, and enjoy their lands? Or did they feel they could, if they so willed, restrict the visiting individuals' movement on their land? If it is the latter, would the Aboriginal

[146] WN Hohfeld, 'Fundamental Legal Conceptions as Applied in Judicial Reasoning' (1917) 26(8) The Yale Law Journal 710.

peoples thus sought to be restricted, recognize and accept as fair or legitimate or proper such restrictions?"

Similarly, the practice of informing the visited clan elders of the visit (at least in relation to land "belonging" to another clan-moiety) can be construed, as the learned Judge seems inclined to do, as no more than custom in the factual sense, i.e., a considerably uniform pattern of behaviour. But it is possible to view it as having normative force, i.e., as being a rule of law in the Aboriginal legal system. Such a rule may be expressed in the proposition: "the visited clan has a right to be informed with a correlative duty on the part of certain visiting members of the clan". If this notion would have been properly raised, it may have proved possible to get sufficient decisive (either way) information in the examination of Aboriginal witnesses. But this opportunity seems to have been foregone.

This, perhaps, wearisome insistence on reformulating the notion of exclusion as an incident of ownership as a power, rather than a right, has the merit of highlighting the rather elusive fact that the Court's ruling on the issue was not compelled by any unambiguous and decisive evidence. Rather, the holding here is the outcome of a discourse bereft of the requisite degree of analytical clarification. Absence of proof of permissive use of non-clan land by Aboriginal peoples (individually or as clans) can be seen to negate an exclusionary right *stricto sensu*, only if we ignore the basic distinction between having a right and exercising it. Absence of such proof is not at all decisive if what needs to be determined is the question of the *power* of the land-holding clan under Aboriginal law and custom.

But it may be argued that this reformulation does not achieve much. Even if the exclusionary incident is better regarded as a power rather than a right, still a power that is not at all or very rarely exercised at any stage between 1788 to 1935 (or till to date) can scarcely be a proper ground for asserting the existence of a proprietary interest on this score. Assuming, *arguendo*, that there exists adequate evidence of non-exercise of this power for the above time-span, it must at once be said that *analytically* there is no reason why power-liability relations should not remain potential legal relations for long periods of time. A government may not exercise certain constitutionally authorized legislative powers for a long time but, so long as the constitution is not otherwise altered, that power remains a power to legislate and citizens of that state remain exposed to a liability to have a duty created (e.g. the non-use for about sixty years of the "corporations power" under Section 51 (xx) of the Australian Constitution). Similarly, individual subjects of a legal order, for example, may not at any time in their lives create principal-agency relations or make wills; but the power to create such relations can still be said to exist. In other words, units of a legal order may have the power to do several things; their non-doing so is *not* tantamount to the extinction of that power*, unless a rule of a given legal system so provides*. What evidence did the *Milirrpum* Court have before it to hold that Aboriginal

legal system thus provided for the extinction of powers conferred by it upon clan-units?

It may be further argued against the present position that since Aboriginal law is pre-eminently customary in nature such exclusionary power might by continuous disuse be abrogated. Such an argument invoking *desuetude* is not compelling until it can be established that systems of customary law must, as a logical necessity, provide for *desuetude*. But surely one can conceive of customary law systems having no such general rule of *desuetude*. Where is, furthermore, the evidence even faintly suggesting that Aboriginal customary law system did contain such a rule? True, there is no evidence to the contrary either. But to accept this is also to accept the present submission that the *Milirrpum* Court decided an issue which it should not have in absence of requisite evidence. Notwithstanding Mr Justice Blackburn's holding to the contrary, we must (with great respect) regard the question of exclusionary power of the plaintiff clans as one which is still in search of an answer.

Perhaps the *Milirrpum* Court may have been influenced by some unarticulated policy considerations. Having found as a matter of fact that bands (comprising members of many Aboriginal clans) made economic use of the subject land, the Court might have felt that any exclusionary "right" in clans would be inconsistent with the traditional way of Aboriginal life. The learned Judge might also have felt that to recognize such exclusionary "right" in clans at this stage would be to enable the plaintiff clans to practice exclusion, this in turn contributing to the "destruction" of the traditional pattern of Aboriginal life.[147]

But this sort of policy argument suffers from the fundamental lack of clarity about the meaning of the term "rights of exclusion". The activities and persistence of bands is just as easily explained by this argument as by the view that the visited Aboriginal peoples did not exercise their power to exclude visiting Aboriginal individuals, but that they exercised it to create a privilege-no right relationship. Moreover, it is far too speculative to feel that recognition of *power* to exclude others by the Northern Territory Supreme Court, at this stage of Aboriginal history of cultural contact with the "Western" world, is in itself likely to generate a destruction of inherited ways of life.

Let us suppose that the Court ruled that in 1788 the Aboriginal law authorized the Gumatj and Rirratjingu clans to exclude other clans from using and enjoying their lands. This *holding* is not likely at all to retrospectively affect between 1788 to 1935 (1788 to 1971) the organization of economic activities of bands. So that this policy argument must have reference only to the future consequences of the judicial recognition of the "rights" of exclusion. This recognition will not obviously be so

[147] In his concluding address Mr Harris, QC for the Commonwealth, put forward an argument on the lines represented in the text. See the *Milirrpum* Transcript, 2944.

general as to involve all aborigines in the Northern Territory or all "tribalized" Aboriginal peoples in Australia but will have to be restricted to the thirteen plaintiff clans in the subject land. It is, furthermore, open to question whether the band performs the same economic function for the plaintiffs' social organization in 1972, and will continue to perform the same function thereafter, as it was performing in 1788 and prior to that date. If the Court had indeed affirmed that traditional Aboriginal law did favour "rights of exclusion" in 1788 or prior to 1788 that holding would have dealt no deathblow to the traditional Aboriginal social organization, now under the manifold complex modern pressures of the economy and the state.

The only consequence of some significance would have related to the further consideration of the plaintiffs' claim as against the Commonwealth and Nabalco's alleged entitlements with respect to the subject land, these would have perhaps been only marginally affected since the establishment of the Aboriginal legal system containing an acknowledgement of native property rights would still have left open the question whether the common law recognized it in 1788 and whether it was desirable to hold that it so did.

E. The Problem of Inalienability

The third constituent element of the concept of property, according to Blackburn J, is the right to alienate the land by the plaintiff clans. The learned Judge simply finds that "the right to alienate is expressly repudiated by the plaintiffs in their statement of claim".[148]

This repudiation must indeed be the last straw, in view of the preceding findings concerning multiple entitlements of user and enjoyment of land by all Aboriginal peoples and the absence of rights of exclusion. On the present analysis, once again, the question is whether the notion of proprietary interest is unintelligible without the so-called "right" of alienation. Related to this is the policy question as to whether there were any compelling grounds for the Aboriginal legal system to explicitly provide for the mobility of land resources served by the "right" to alienation in modern societies.

Blackburn J recognizes that all the incidents of proprietary interest, of which *jus disponendi* is one, can be qualified. Clearly, also, it is inconsistent with His Honour's position for this "right" to be *so* qualified as not to exist at all.[149] This was precisely what the plaintiffs asserted: they had no right to alienate their clan lands. The question is whether the proposition "X has a proprietary interest, but that X cannot alienate its property" is meaningless and self-contradictory.

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[148] *Milirrpum* [272].

[149] Although we must note that the learned Judge does not insist either upon the coexistence of all the three incidents as a precondition of proprietary rights. See *Milirrpum* [272].

Obviously, the question can only be answered by a stipulative definition of the notion of "proprietary interests" or "ownership". The learned Judge adopts a stipulative definition which in turn would make the above proposition formulated in the question meaningless. But it must be noted that on other definitional approaches, one might find such a proposition meaningful on the view that *jus disponendi* is not a defining characteristic of proprietary interests or "ownership".

The question then is what are the good reasons for stipulating the "right to alienate" as a constituent e1ement of ownership? We recall that principal reasons for treating rights of user and enjoyment of the law, and "rights" of exclusion were that these rights were explicitly claimed as being recognized by Aboriginal law and custom. But the right to alienate was not thus claimed; it was denied by the plaintiffs. All that this repudiation meant was that the Aboriginal system's definition of proprietary does not require the right to alienate (it might even forbid any alienation). Mr Justice Blackburn's insistence that such a right nevertheless must exist before the Aboriginal peoples' interests can be labelled "proprietary" *is clear but an example of the imposition of a Western notion upon an indigenous system which did not need it.*

This insistence is puzzling, for the learned Judge could have held, as he did, that no Aboriginal proprietary interests recognizable at common law existed in 1788 because there was no "right" of exclusion. That finding standing alone would have been conclusive from the Court's point of view, and in terms of our conceptions of property which coincided on this point with those of the plaintiffs', as shown by their statement of claim. And supporting such a conclusion, though rather feebly from the present point of view, would have been the holding that clans *as such* did not have a right of secular use and enjoyment of land.

Historical enquiries into the law of real property could yield a number of situations in Western law where either the right to alienation is absent for a period of time without affecting the nature of the proprietary interest or where multiple and varied restrictions upon alienation exist again without any destructive impact upon a clearly recognized proprietary interest.[150] And detailed enquiries into indigenous systems of African law would demonstrate recognition of interests as proprietary, in the absence of a *jus disponendi*.[151] The power to alienate property is necessary to ensure mobility of resources within a society. Legal recognition of this power (it is analytically inappropriate to speak of a "right" to alienate) is only an indication, even if a strong one, of how legal techniques are used to serve clearly desired social ends. Richard R. Powell in his authoritative discussion on the law of restraints upon alienation of real property pointedly observed:

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[150] See, e.g., Richard R Powel, *Powell on Real Property*, vol 6 (Matthew Bender & Co 1955) 1-34, 35-90.

[151] See, e.g., SN Chinwuba Obi, *The Ibo Law of Property* (Butterworths 1963) 41-43; TO Elias, *The Nature of African Customary Law* (Manchester University Press 1956) 169.

> When a society says to an owner of property "This you may not do", the prohibition presupposes a social judgment that the proposed form of disposition will significantly interfere with the long-time welfare of the affected society…the law on alienability…is a variable, properly responsive to the wisdom and social philosophy of a particular society at a particular moment of time.[152]

What "social judgment" is embodied in the Aboriginal legal system's total prohibition of alienation of clan-lands? An answer to this question must be sought through legal anthropology. But one can point to several factors relevant to such a scientific explanation. *First*, there was an abundance of productive assets in land as compared to the range of needs of a pre-agrarian people. *Second*, the relatively low levels of technology of resource use, coupled with traditionally limited range of such uses, contributed to a state of continued moderation of needs. *Third*, Aboriginal communities were relatively several and geographically scattered. *Fourth*, the ritual and religious use of land and the relative invariability of mythical linkages creating sacred sites may provide a deeper reason for the inalienability of land. *Fifth*, the apperceived relation of the sacred character of some sites within the land to the overall maintenance of patterns of social cohesion could be an important value factor militating against easy alienability.

It is surprising that Mr Justice Blackburn, despite his awareness of the different levels of societal and evolutionary complexities, should have failed to enquire altogether into the rationale of the inalienability *before* attaching to it such a drastic consequence. Absence of the power to alienate need not, in the light of factors such as enumerated above, necessarily signify the absence of recognized (by the Aboriginal legal system) and recognizable (by common law in 1788) proprietary interests in land.

F. "Ritual" And "Economic" Uses of Land

As noted, Mr Justice Blackburn finds that the greatest extent to which it is true to say "that the clan as such has a right of use and enjoyment of land and of exclusion" is for ritual and religious purposes. The economic use of land was made not by clans as such but rather by bands. It is difficult to ascertain the precise nature of the impact of this finding on the ultimate holding on the issue, but it must have had a significant, if not decisive, impact.

The obvious question here is: is it necessary (and if so for what reasons) that an interest which can be characterized as proprietary must be "economic" in nature?[153] Why is the proven religious interest full with enjoyment and exclusionary powers *not* to be recognized as proprietary interest? If the answer is that such an interest lacked

[152] See Powell (n 151), 35.

[153] Vinding Kruse, *The Right to Property*, vol 1 (OUP 1939) 79-102, raises some fascinating questions concerning "spiritual property" in industrial society and law's recognition of it.

the third constitutive element—the power of alienation—the policy arguments of the preceding section of this paper apply here even more strongly.[154]

The *Milirrpum* Court *ought* to have clearly held that the Aboriginal legal system did recognize proprietary interests of clans as clans in land for religious use and enjoyment. To be sure, this finding would have to be limited to delineated sacred sites. Such a holding would still have left open the further question: whether the Court can impute to common law, as in 1788, the recognition of such proprietary interests? On this latter question, the Court would have had much more flexibility because the comparative case law (of the United States, New Zealand, Canada, Africa, India, and New Guinea) had *no* decisive guidance to offer either way. This secular comparative material was focused on property rights of a type; Aboriginal peoples' claims in this context were unique in the true sense of that word.

The *Milirrpum* Court could have thus, if the issue in this limited form would have been clear before it, held that common law in 1788, and in its later developments, can be said to have recognized "ownership" of certain sacred sites in the plaintiffs' clans. The only difficulty in so holding could have stemmed from a long line of Australian decisions propounding the intransigent doctrine that "every inch" of the Australian continent belonged to the Crown from the moment of settlement.[155] But this difficulty is not formidable. In its examination of comparative case law, the Court has already accepted the proposition that the ultimate ownership of the Crown of the discovered or settled territory is consistent with the communal native title, *if* such a title is (i) proven; and (ii) if recognition of such title could be imputed to common law in 1788.[156] The limited communal native title in sacred sites is substantially, if not wholly, acknowledged as proven. It is not wholly so acknowledged for the simple reason that without any well-considered reasons the power of alienation is regarded as a crucial component of proprietary rights.[157] Had the Court, however, considered in some detail the rationale for provision of such power by legal systems, it is very likely that inalienability of interests in sacred sites would not have been perceived as fatal to their characterization as proprietary. And if the Court had gone thus far, it also could have found itself encouraged (rather than deterred) by the comparative case material to recognize Aboriginal peoples' rights in sacred sites consistent with the Crown's ultimate title. Furthermore, there is much to be said generally (which could be said even more effectively on the limited issue of recognition of Aboriginal "ownership" of the sacred sites) in favour of limiting the controlling range of the vast statements in "binding" Australian authorities, without necessarily affecting their authority.

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[154] As also the clear acceptance by the Court that not all the three "incidents" need to co-exist before any interest can be recognized as proprietary (*Milirrpum* [272]).

[155] Notably from *Williams v Attorney-General for NSW* (1913) CLR 404; (1959) 102 CLR 54; *Attorney-General v Brown* (1847) 1 Legge 312; 2 SCR (NSW) App 30.

[156] E.g., *Milirrpum* [211].

[157] Contrary to the Court's own statement. See *Milirrpum* (n 155).

It may be said that there is, however, a further difficulty, more formidable than the ones hitherto canvassed. This arises from the Court's clear finding that the predecessors of the plaintiffs did not, on the balance of probabilities, have the same links with the subject land as now claimed by the plaintiffs. If this is so, how can the plaintiffs show a clear title to sacred sites, held in continuity from 1788 till 1935 (or 1972)?

The answer to this question is that there is no sufficient evidence either way to indicate the antiquity of links regarding sacred sites. The evidence, as recorded in the judgment, was undifferentiating in its treatment of the "sacred" and "secular" use of land. The expert testimony of Professor Berndt, focusing on mythological rather than historical, explanation of mutations and dispersal of *mata-mala* pairs was obviously more relevant to any appraisal of continuity in the holding of sacred sites, than it was for the links of antiquity in terms of landholding *simpliciter*.[158] For example, the phenomenon of "enclaves" created by sacred sites of one clan found in the "territory" of another, and the mythological explanation of it in terms of movements of "spirit ancestors" creating "sacred links" between a tract of land and a clan, was problematic only insofar as probabilities of holding of *all* land claimed by one plaintiff clan were concerned.[159] *But* the "enclave" phenomenon need not be problematic at all if the focus of interest is to *identify the antiquity of the links in terms of clan-claims to certain sacred sites*.

It is not important for the present position to identify at this very stage a variety of ways in which the evidence could be supporting an acceptable level of probable links of antiquity in relation to sacred sites. It is sufficient to maintain merely that such links could have been established on the balance of probabilities *if* the evidence had been gathered or analysed in terms of a clear classification of "religious" and "economic" use of the land. One has the feeling that discovery of links of antiquity regarding sacred sites would have been a more tractable, if not less complex task.

It must, of course, be admitted that the very doctrine of the communal native title which makes possible a clear holding that the Aboriginal clans are entitled to sacred sites also carries the consequential proposition that such title can be extinguished by the Crown. But the fact that the Crown is empowered to extinguish the title is scarcely an argument against its recognition. Moreover, if the title to sacred sites is recognized, it is not far too speculative to suggest that it might attract the protection of the freedom of religion clause in the Australian Constitution. Whether such protection will be afforded under Section 116 of the Constitution, or whether an escape from such possible protection by *valid* executive measures is open, are important questions worthy of further investigation.

[158] *Milirrpum* [187]-[195].
[159] *Milirrpum* [193].

Clearly, the *Milirrpum* Court missed an important opportunity of doing justice *within* the law by being altogether inadvertent to the overall significance of the clans' right to use and enjoy the land, and its powers of exclusion, in the realm of ritual uses of land, and by a rather undiscerning emphasis on the centrality of the power of alienation. We must read the *Milirrpum* decision *not* as foreclosing the issue of the communal native title concerning sacred sites but rather as raising it in the most effective manner.

V. A Frightful Legislative Tangle

A. Introduction

It was, of course, essential for the plaintiffs not merely to attempt to demonstrate that the clans posited proprietary interests in their lands were recognizable and recognized at common law at the relevant time but also to argue that these interests were not validly terminated in law. But the 1953 Mineral (Acquisition) Ordinance purported to "vest bauxite in Crown if it was not already the Crown's property".[160] And the agreement between Nabalco and the Commonwealth found legislative endorsement in the 1968 Mining (Gove Peninsula Nabalco Agreement) Ordinance.[161] The plaintiffs had to argue that neither Ordinance was valid and consequentially extinction by the legislation of the communal native title in land was not as yet accomplished.

The various statutory provisions of the Northern Territory (Administration) Act, 1910 are so complex that at the very outset of any appraisal of judgment on these issues, one must take due note of Mr Justice Blackburn's completely justified sense of exasperation. At one stage in the proceedings, His Honour observes:

> I do not think I have ever seen a more frightful legislative tangle…I have the feeling of walking through a dark jungle and very occasionally seeing a glimpse of light through the tops of the trees. Then it closes over again as we walk a little further.[162]

This writer shares this exasperation and, unlike the learned Judge, finds it very difficult to make his way through the legislative thicket by means of occasional limited outbursts of illumination.

B. The Plenitude of Delegated Power of The Territory's Legislative Council

The Northern Territory Administration Act 1910 (hereafter Administration Act) in its ninth section made applicable the Land Acquisition Act 1906 to acquisition by the Commonwealth of "any lands owned in the territory by any person" for a "public purpose".[163] The plaintiffs argued that Section 9 of the Act constituted a limitation on

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[160] *Milirrpum* [148].
[161] ibid [149].
[162] *Milirrpum* Transcript, 2327
[163] *Milirrpum* [286].

the legislative power of the legislative authority for the Northern Territory. It was not open, therefore, to such authority to acquire any property, legislatively or otherwise, outside the framework of the Land Acquisition Act, 1906. A 1947 Amendment to the Administration Act, however, provided (by addition of Section 4U to the Act) that "subject to this Act, the Council may make ordinances for the peace, order and good government of the Territory". Was the Minerals (Acquisition) Ordinance, 1953 providing for the direct legislative acquisition of the subject land *ultra vires* of the Administration Act?

Analytically, this question can be answered in at least three distinct ways. *First*, it can be maintained that Section 9 is neither a power-conferring nor power-limiting provision. All that the section requires is that once the determination to exercise the *eminent domain* powers is made, the provisions of the Land Acquisition Act, 1906-1955 will apply to the process of acquisition. On this sort of argument, the *eminent domain* power will have to be simply postulated as an inherent power of the Crown, available to the Northern Territory Legislative Council.

The *second* sort of answer will acknowledge that Section 9 of the Administration Act does in law limit the Council's legislative power *when that power is sought to be exercised under that section*. Section 9 applies only to one method of acquisition of property, involving acquisition by the executive "by means of either voluntary agreement or compelling powers". But surely *other* ways of acquisition are legally permissible under the Administration Act as authorized for example, by Section 4U of the Administration Act. Insofar as the 1953 Ordinance can be regarded as falling under either of these provisions, it must be regarded as *intra vires* of the Administration Act. This, in effect, was the reasoning of Bridge J in *Kean v The Commonwealth*.[164]

The *third* answer, and the one elaborated by Blackburn J, proceeds on the view that the legislative power of the Territories Legislative Council is "plenary". On this view, Section 9 does not *at all* constitute a limitation on the legislative power. It is, in fact, a facilitative provision in the sense that it enables the legislative authority to carry out acquisition in a specific manner. His Honour concedes that the plenitude of the Council's power does not extend so far as to provide that, contrary to the mandate of Section 9, the Lands Acquisition Act should have *no* application whatever.[165] To so provide would be in effect to "repeal" that section, "a provision of the legislature which created" the Council in the first place.[166] To enact different schemes for land acquisition is, however, not necessarily to "repeal" Section 9. Nor indeed is a piecemeal tinkering with the provisions of the Lands Acquisition Act such a "repeal", even though its precise effect may be to exclude the very operation of certain provisions of that Act to

[164] (1963) 5 FLR 432.
[165] *Milirrpum* [168].
[166] ibid.

the Territory. Therefore the 1953 Ordinance was not invalid as being contrary to Section 9.

The third answer is fraught with difficulties. Whatever one might mean by the expression "plenary", Blackburn J is surely correct in maintaining that the Territory's Legislative Council cannot "validly enact anything directly contrary of Section 9 as, for example, a provision that the *Lands Acquisition Act* should have *no* application to the Northern Territory", for, to do so would be to usurp the authority of the parent legislature.[167] If this is indeed so, then Section 9 does in law constitute some sort of limit on the "plenary" legislative power of the Territory. But then on His Honour's own showing the Lands Acquisition Ordinance, 1911, enacted by the legislative authority did precisely that which His Honour asserts is impermissible. That Ordinance, for example, provided that Section 51 of the Lands Acquisition Act shall *not* apply to lands acquired within the Territory.[168] The 1911 ordinance thus *repealed* Section 51 of the Lands Acquisition Act. The fact that this action was, and is, not challenged does not alter the *analytical* point that the legislative authority did exercise a power which it did not have (on His Honour' s present view). It is, of course, arguable that alteration of a provision of the Land Acquisition Act is not the same as the repeal of the entire Act; and not the same surely as the formal repeal of Section 9 of the Administration Act prescribing observance of the Lands Acquisition Act. But to so argue would be to take the view that the Lands Acquisition Act as a whole is different from the sum of its parts and to authorize the repeal of substantial segments of it which may still leave the Act as a whole unrepealed. Section 9 directive must clearly apply to every provision of the Lands Acquisition Act. To repeal any part of it is to violate its directive.

The same sort of difficulties attends the argument that Section 9 cannot be formally repealed but that the Territory's Legislative Council can adopt a wholly different procedure of acquisition then that prescribed by the Lands Acquisition Act. The mere assertion that the power of the relevant legislative authority is "plenary" does not help clear thinking, especially when that plenitude is *somehow* limited by Section 9. This is so because it is conceivable, and likely, that a scheme for acquisition of land for public purpose may not at all respect any or all the safeguards (procedural and substantive) which the Lands Acquisition Act provides. If nevertheless, such a scheme is within the power of the relevant legislative authority, then Section 9 is effectively repealed, though it may verbally remain on the statute-book. When such a scheme is legislated, it is tantamount to saying, albeit indirectly, that (in Mr Justice Blackburn's words) "the Lands Acquisition Act should have no application to the Northern Territory". Assume that the Legislative Council regularly resorts to the legislative acquisition methods for a period of fifty years and that *all* acquisitions in that period

[167] *Milirrpum* [285]-[286].
[168] ibid [286].

are under these new methods (rather than under Section 9 directive). Although, in this situation, Section 9 has not been formally repealed, the legislative power has been exercised in a manner which effectively evades His Honour's stipulation concerning restriction on that power.

There are only two analytical possibilities. *Either* the Territory Council's legislative power is "plenary" to the extent of its being unfettered in this respect by the directive of Section 9 of the Northern Territory Administration Act or the plenitude of this power is limited by that section. Blackburn J finds that the power is not "plenary" to the extent entailed in the first alternative; *and* nevertheless, rejects the second a1ternative. This surely is analytically wholly impermissible.

His Honour is not insensitive to this difficulty. Thus, on the one hand, he asserts that it is not strictly necessary for him to rely on (what he perceives to be) the reasoning of Bridge J in *Kean v The Commonwealth*; while, on the other hand, his Honour resorts to it in case he is "wrong" in his "view of the proper construction" of Section 9.

Mr Justice Blackburn takes the view that *Kean v The Commonwealth*[169] proceeded on the assumption that Section 9 "does provide a limit on the legislative power" but holds that "such limit was not exceeded" by the Minerals (Acquisition) Ordinance, 1953, "because, on their true construction, the Lands Acquisition Act and the Minerals (Acquisition) Ordinance are not inconsistent".[170] His Honour further agrees "with this view of the construction of these two statutes".[171] It is submitted, with respect, that the *Kean* reasoning is altogether free of traces of any detailed comparison between these two measures. Bridge J in that decision no doubt observes that he does not see anything "so exclusive in the application of the Lands Acquisition Act 1906-1916, to the Territory on the 22nd April, 1953, as to preclude Commonwealth acquisition of Territory land by or under another law…".[172] The finding that the Lands Acquisition Act was not exclusive is one thing; the finding that the Act and the 1953 Ordinance were not "inconsistent" with each other is another. The latter requires at the very least a comparative analysis of the objectives, structure, and processes of acquisition. A finding of non-exclusivity is not necessarily a finding of consistency.

The fact is that Bridge J found that the Act and the Ordinance were rather *incomparable* in these terms. The Act provided for land acquisition "being effected through the executive" whereas the impugned Ordinance effected "the acquisition itself as a direct legislative process without resort to executive action of any kind".[173] And the authority for the latter arose from Section 4U of the Northern Territory

[169] (1963) 5 FLR 432 (hereinafter *Kean*).
[170] *Kean* [441].
[171] *Milirrpum* [286].
[172] *Kean* (n 171).
[173] ibid.

(Administration) Act 1910-1949 and Section 10 of the Northern Territory Acceptance Act, 1910-1952.[174] Because the power conferred by Section 4U (relevant also in the present case) of the Administration Act was characterized by Bridge J in the companion case *R v Lampe*[175] as "plenary", Bridge J does not proceed to explain—in *Kean* as to how Section 4U can overcome the directive of Section 9. So that Mr Justice Blackburn's reliance on *Kean* and *Lampe* help only based on the "plenary" power rationale.

Section 4U of the Administration Act provides: "Subject to this Act, the Council may make Ordinances for the peace, order and good government of the Territory". The *Kean* decision nowhere squarely confronts the meaning of the proviso with which the section opens but refers us only to *Lampe*.[176] In *Lampe*, at issue was Section 12 of the Building Ordinance 1955, of the Northern Territory Council which authorized *inter alia* the Administrator to make regulations concerning the subject of the Ordinance and also to sub-delegate such powers to the Board created by the Ordinance. The plaintiff's argument, in essence, was that the relevant law-making power vested either in the Legislative Council of the Territory or in the Administrator was "merely a subsidiary power of a sub-ordinate delegate" subject in its exercise to the maxim: *delegatus non potest delegare*.[177]

The plaintiffs were also arguing that the proviso of Section 4U meant especially that the legislative power of the Council was restricted by provisions (Sections 4V, 4W, 4X, and 4Y) requiring the assent of the Administration "or requiring or permitting reservation or authorizing disallowance".[178] Such power, therefore, was not of a "plenary" nature, allowing the power of further delegation and sub-delegation.

It was in this context that Bridge J held, reinforced by a long line of the Privy Council rulings,[179] that the legislative power of the Council *is* "plenary". Bridge J also endorses the opinion, expressed by Kriewaldt J, that the "subsidiary and partially representative" character of the Territory's legislature does not affect the plenitude of its power, as is indicated by the use of the formula "peace, order and good government"—a formula typically used for the grant of legislative power to a "fully (or semi) self-governing authority".[180] But Kriewaldt J *also* held that this plenitude found its limits in the proviso to Section 4U and a1so in "the overriding power of the Parliament to make laws for the territory".[181]

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[174] *Kean* [436]-[437].
[175] *R v Lampe; Ex Parte. Maddalozzo* (1963) 5 FLR 160.
[176] *Kean* [437].
[177] *Lampe* [166].
[178] ibid.
[179] ibid [167]-[169].
[180] *Namatjira v Rabbe* (1958) NTLR 437.
[181] As quoted in *Lampe* [169].

Bridge J in *Lampe* sees himself as in disagreement with those stated limits. But his judgment contains *no* discussion *at all* for the abovementioned second limit. Insofar as the Section 4U proviso is concerned, while Bridge J asserts rather sweepingly that "the plenitude of the Legislative Council's lawmaking power is" not "qualified by…the opening words in Section 4U",[182] all that the learned Judge decides upon is the ambit of Sections 4V, 4W, 4X and 4Y dealing with gubernatorial and the Administrator's assent. Bridge J is clear that these latter provisions do not at all deprive the council's power of its plenitude. This may be true; but it does not bear out the more general claim that *nothing* in the Act, including the opening proviso of Section 4U, limits the exercise of Section 4U power at all. If that were so, the proviso of that section would become otiose. But on the facts before him in *Lampe* it was scarcely necessary for Bridge J to consider this aspect. It was essentia1 in *Lampe* to arrive at a conclusion that the relevant legislative power was "plenary"; it was neither necessary nor in fact warranted for the *Lampe* Court to identify precisely all or even the most important limits of that plenitude. The sweeping language of Bridge J concerning plenitude knowing no limitation, despite Section 4U proviso, can only be considered as good rhetorical flourish setting the mood for characterization of the Council's power as "plenary" *in the context of delegation and sub-delegation of rule-making power.*

So that the *Kean* reference to *Lampe*, and the *Milirrpum* reference to these cases, do not really advance us much further as regards the limits, if any, of the plenitude of the Council's power. To say that that power is "plenary" is only a part of the answer. Surely, the real question is "plenary" to what extent?

As we saw earlier, Mr Justice Blackburn himself does not confront this question. When His Honour does refer to the Section 4U proviso, he does so in a way that makes Section 9 irrelevant! Thus, according to Blackburn J:

> If the words of S.9 do not provide a limit to the legislative power of the Counci1, the phrase "subject to this Act" does not take the matter any further. But in any event, I agree with what Bridge J said in *Lampe*'s case, that the phrase is a limitation, not on the legislative power of the Council, but on the manner of the exercise.[183]

This, with great respect, will simply not do, for at least two reasons. *First*, as we have seen, the words of Section 9 are not seen as a limit on legislative power because that power is construed to be "plenary"! But the question that the proviso to section 4U raises is precisely as to whether that power should be construed as having such plenitude as overrides Section 9 type provision. It is scarcely an answer to an argument based on the proviso "subject to this Act" to say that the legislative power is *not* "subject

[182] *Lampe* [169].
[183] *Milirrpum* [286].

to this Act". But that is what "plenary" power in an unqualifiable sense must mean.

Second, it is true that Bridge J said in *Lampe's* case that the Section 4U proviso, "subject to this Act", does not affect the plenitude of the legislative power of the Council insofar as there exist limits on the manner of its exercise. Bridge J was referring (as shown earlier) to provisions for consent and modification by the Administrator and the Governor-General. *These* provisions do *not* affect the plenitude of Section 4U power. But from this proposition, it does not follow at all *either* that the Section 4U proviso does not affect legislative power as regards *all* the provisions of the Act *or* that Section 9 directive (which is a substantive power) may not be a limit on power attracted by that proviso.

It still remains open to argue, as Blackburn J seems to do, that regardless of the foregoing Section 9 can be assimilated to these sections concerning the Administrator's or Governor-General's assent etc. on the principle that what is entailed is not a limitation "on the power of the Council but the manner of the exercise". This sort of argument is *prima facie* persuasive. It deserves close examination.

In *Lampe*, we repeat, the question was whether the provisions for assent, recommending amendments, or of disallowance by the Administrator or the Governor-General of Ordinances passed by the Legislative Council of the Territory were such limits on its legislative authority as to make it a subordinate, "non-plenary" legislature. On Mr Justice Bridge's analysis these provisions did not make "legislative powers…non-plenary". They rather "make such an exercise incomplete until the relevant conditions are satisfied".[184]

Blackburn J would generalize the *Lampe* holding to suggest that the meaning of Section 4U proviso is that the words "subject to this Act" mean only that the manner of the exercise of the legislative power is restricted by the provisions of the statute. This is certainly tenable. But note that this view must also imply that the "manner-of-exercise" restrictions in the Act render the purported exercise of the power *incomplete*. This is self-evidently the case with the provisions before the *Lampe* Court; does this however make sense in the Section 9 context? For to follow through the *Lampe* reasoning on this point we will have to say that the 1953 Ordinance, insofar as it does not comply with Section 9 directive, is an incomplete exercise of a plenary legislative power. But "incomplete" in what sense if the assent by relevant authorities has been given, as in the case in 1953 Ordinance? So, Section 9 cannot even be a "manner of exercise" type restriction on legislative power.

On this sort of analysis, there is no need to refer to *Lampe* or to make a distinction between a limit on legislative power and a limit on the manner of its exercise. We are left with a bare statement then in the *Milirrpum* Case to the effect that

[184] *Lampe* [169]-[170].

Section 9 is in no sense a limit on the power of the Legislative Council of the Territory. *This* statement is *not* satisfactory because Section 9 does mandatorily render applicable a Commonwealth law to the Territory. To enact an ordinance which does not respect the provisions of this law is to defy this mandate, unless the Lands Acquisition Act, by clear implication, authorized an alternative method of acquiring property for public purpose. It cannot be argued that the plenitude of the Council's legislative powers is so unqualified as either to overcome the limitations of the Act which creates the Council or to transcend the underlying authority of the Commonwealth. If we cannot construe meaningfully Section 9 as being a "manner of exercise" type limit on the Council's legislative power, then the clear wording of Section 9 and the proviso of Section 4U require us to regard the directive of Section 9 as a limit on the legislative power of the Council. To say that it does not constitute this type of limit either, is also to say that Section 9 is only a discretionary and enabling type of provision, *despite* the mandatory formulation thereof. This is in effect what the *Milirrpum* Court holds, relaxing for once its own rather strict canons of construction. But to so relax the construction, with respect, is in effect to legislate a change in Section 9 substituting the word "shall" therein to "may". It is inconceivable that Mr Justice Blackburn consciously intended to make such a change. Nevertheless, such a change is indeed the outcome.

The point of departure then is not here one of strict law, but one of policy and it ought to be evaluated as such. Thus, when Mr Woodward for the plaintiffs urged the Court to be advertent to "the traditional hostility of the law and of Parliament itself to the arbitrary acquisition of private property",[185] the Court's response, with respect, moves back to the level of strict law. Blackburn J finds that this sort of a consideration is not "weighty" to "displace the view that Section 9 was not a limit on the legislative power of "the Governor-General under S. 13, or of the Legislative Council under S. 4U".[186] Counsel's argument was precisely that Parliament could *not* have intended to confer a power of arbitrary acquisition. Neither Section 13 nor Section 4U by their wording assert the contrary. Mr Justice Blackburn's decision must then be regarded as a policy decision involving the view *either* that the 1953 Mining Ordinance was not an arbitrary method of acquiring citizen's property or that even if it was an arbitrary method, it was nevertheless acceptable to the Court. The latter conclusion cannot be attributed to a judge so conscientious as Blackburn J. The former does find some support in the view *attributed* by the learned Judge to *Kean*, in that the *Kean* Court proceeded on the finding of "consistency" between the Lands Acquisition Act and the 1953 Ordinance. But as we have already tried to show, far from making any finding

[185] *Milirrpum* [286]-[287].

[186] ibid. If anything, this outcome dramatically illustrates the need for a bill of rights type guarantee in the Australian Constitution. Article 51 (xxxi) requiring compensation on "just terms" for acquisition of property is inoperative in the present context by virtue of the rather summary and drastic ruling of the High Court *in Tau v Commonwealth* (1969) 44 ALJR 25.

of consistency between the Act and the Ordinance, *Kean* proceeds based on their incomparable nature.

PERSPECTIVE ESSAYS

Indian Necropolitics and Weaponizing Covid-19 in Kashmir

Ather Zia

Hopeful Rantings of a Dalit-Queer Person

Dhiren Borisa

INDIAN NECROPOLITICS AND WEAPONIZING COVID-19 IN KASHMIR

Ather Zia[*]

Spring 2020: Double Lockdown

In the middle of March 2020, rumours of the Covid-19 lockdown were getting stronger in Kashmir. A friend observed: *"Hindustanan korr asi satay gazz asmaan! khabar ami Covid-lockdown-eh seeth ma gatche thoda farakh 35-A badlawnass?"* The literal translation of the maxim used by my friend is that the sky [for the people] was brought down [by India] to a distance of mere 7 "gazz", an old Mughal measurement amounting to a yard. It was a pithy shorthand that conveyed the extraordinary duress enforced since August 5, 2019 when India unilaterally and militarily removed Kashmir's autonomy. The coercive policies of the Indian Government had proceeded at an extraordinary speed, choking and diminishing any remnants of free space and expression. My friend, a quintessential ever-optimistic Kashmiri, in the same sentence, also expressed hope that the impending Covid-19 lockdown might either slow or halt the Government of India's policies geared towards bringing demographic change, which has been the biggest fear after the revoking of autonomy. Thus, when the Covid-19 lockdown was taking effect across India, Kashmir, already under a full and partial siege for over 9 months, was slapped with another lockdown; bringing the region under a double lockdown.

Across the globe, the pandemic manifests the operation of Foucauldian biopower, subjecting life to extreme control and regulation in order to administer, optimize, and multiply it. In Kashmir, the only prevailing mode of biopower is what Achille Mbembe[1] calls necropolitics,[2] a decolonial analytic lens that focuses on how governmentality operates in a system of hegemonic neoliberal and neocolonial violence dictating who may live and who must die. Necropolitics becomes apparent in a situation of siege, or a camp where dissident and unwanted populations are detained in order to make it easy to govern, control, harass, and annihilate them. Kashmir, one of the most densely militarized regions in the world, is a de-facto camp

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[1] Achille Mbembe, *On the Postcolony* (University of California Press 2001).

[2] Achille Mbembe, *Necropolitics* (Duke University Press 2019).

militarily controlled and occupied by laws like the Armed Forces Special Powers Act, 1958.[3] Such laws give the military power to control the region with impunity and zero accountability, resulting in the cessation and abuse of basic human and civil rights. These laws, an evidence of India's colonial constitutionalism, have been deployed to perfect the necropolitical practices inside Kashmir. In this context, how could it be that the Indian state would suddenly turn a benevolent caregiver and the imposition of the Covid-19 lockdown would solely be aimed at safeguarding Kashmiri life—one that is considered "a killable body"[4] in the Indian nationalistic vision? It was not a surprise that my friend's hope for some ease, however, remained only that—a hope.

While most of the globe is dealing with the singular infection of Covid-19, Kashmiris are facing multiple infections from a military occupation, the latest of which is its necropolitical weaponization of the pandemic. The Covid-19 lockdown became a ready camouflage for the military occupation to operate upon a population doubly quarantined. It is evident that the Indian Government is taking advantage of the population's immobilization and continuing its nationalistic agenda at a breakneck speed—both militarily and administratively—which further subjugates the Kashmiris.

Summer 2019: The Siege Before Covid-19 Lockdown

On August 4, 2019, my WhatsApp lit up with a luminous photograph (see *figure 1*) of the shrine of Hazrat Mir Syed Ali Hamadani (*figure 2*). It was my parents sharing with me their visit to the shrine, which is an enduring symbol of the spiritual, political, and cultural independence of Kashmir. They were planning to visit the shrine for seven consecutive days, a pledge that devotees often take for their spiritual salvation. But they only made it to day one. The photograph became the last contact I had with my parents for the next three months or so.

On the fateful day when my parents visited the shrine praying for peace, they were surrounded by the panic of an undeclared war. The Indian Government had flown in 48,000-plus troops on top of the 650,000-plus already present in the region. With rumours and speculation rife, Kashmiris single-mindedly began to do the only thing in their control: stocking up and hunkering down for whatever was to come. People flocked to the markets for rations, medicines, baby food, and gas. A photo of an old Kashmiri man stocking gas in a small plastic flask went viral.[5] Living in the "postcolonial" aftermath which has steadily eroded their sovereignty, responding to the contingencies of a protracted and invisible war has become a part of the Kashmiri life.

[3] H. Duschinski et al. (eds), *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2018).
[4] Ather Zia, 'The Killable Kashmiri Body: The Life and Execution of Afzal Guru' in H. Duschinski et al. (eds) *Resisting Occupation in Kashmir* (University of Pennsylvania Press 2018).
[5] Mudasir Ahmed, 'Amidst Kashmir Panic, Political Parties Want Centre to Break Silence' *South Asia Journal* (3 August 2019) <http://southasiajournal.net/amidst-kashmir-panic-political-parties-want-centre-to-break-the-silence/>.

On August 5, 2019, the right-wing Hindu supremacist Bharatiya Janata Party (BJP) Government put into motion a multi-pronged military approach for the complete annexation of Indian administered Kashmir.[6] The spectacle of military power wielded by the Indian nation-state was super-charged with religious and nationalistic zeal, the hallmark of BJP. An elderly Kashmiri man called it a "chadayi" (invasion/annexation) mounted by India.[7] This happened under the camouflage of "integration" to consolidate the Indian nation state. India's local client-politicians in Kashmir who have run sham governments for New Delhi since 1947 were also arrested and detained. Average civilians, resistance leaders, human rights defenders, lawyers, journalists, and businesspeople were put under detention or house arrest.

Towards the end of October, the detainees were being released only if they signed a bond that banned them from any kind of political activity, most of all speaking against the removal of autonomy. Many prisoners were booked under the Jammu and Kashmir Public Safety Act, 1978 (PSA), notoriously known as the lawless law because it allows the arrest and incarceration of people without charge or trial for up to two years. The number of civilians under arrest grew to the extent that the Government forces began looking to rent private property to use as detention centres. Mass arrests continued and at one point more than 13,000 juvenile children were put under detention and many were imprisoned in jails outside Kashmir.[8] Kashmiri journalists were barred from reporting. Initially, foreign reporters were allowed but were later stopped from going into the region. The trickle of news reports that did surface in the international media reflected a fearful yet a resistant population.[9]

Kashmir's autonomy was illegally removed by a rushed presidential decree without consulting the Kashmiri legislature, which had been disbanded previously, or the people[10]; this was decried as an "unconstitutional deed accomplished by deceitful means",[11] and a "constitutionally suspect" deed which [could not have been] achieved

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[6] Goldie Osuri, 'Kashmiris Are Living a Long Nightmare of Indian Colonialism' (*The Conversation*, 2019) <https://theconversation.com/kashmiris-are-living-a-long-nightmare-of-indian-colonialism-121925>.

[7] Interview with Mohammad Abbas Shah (Personal Communication, 12 January 2020).

[8] 'Full Text: Women's Voice; Fact-Finding Report on Kashmir – Maktoob' (*Maktoob*, 24 September 2019) <https://maktoobmedia.com/2019/09/24/full-text-womens-voice-fact-finding-report-on-kashmir/>.

[9] Jean Drèze et al., 'Kashmir Caged: A Fact-Finding Report' (*NCHRO*, 2019) <https://www.nchro.org/index.php/2019/08/14/kashmir-caged-a-fact-finding-report-by-jean-dreze-kavita-krishnan-maimoona-mollah-and-vimal-bhai/>.

[10] Suhrith Parthasarathy, 'An Exercise of Executive Whim: Negation of Article 370 In J&K Doesn't Stand Up to Constitutional Test, Strikes at Federalism' (*Times of India Blog*, 2019) <https://timesofindia.indiatimes.com/blogs/toi-edit-page/a-plainly-illegal-order-why-the-overturning-of-article-370-in-jk-doesnt-stand-up-to-constitutional-test/>.

[11] A Deshmane, 'Kashmir: Scrapping Article 370 "Unconstitutional", "Deceitful," Says Legal Expert A.G. Noorani' (*Huffington Post India,* August 2019).

Image 1: "[M]y WhatsApp lit up with a luminous photograph"

Image 2: The inner sanctum of the shrine of Hazarat Mir Syed Ali Hamadani, Khankah, Srinagar

unilaterally.[12] An Indian actor and a prominent BJP supporter tweeted, "Kashmir solution has begun". It sounded ominous and the similarity with the *final solution* was not lost on the Kashmiris. The Indian Government put eight million Kashmiris under curfew and an unprecedented communication lockdown.[13] Strict restrictions were put in place on mobility and all forms of media, internet, landlines, and cell phones. A radio silence emanated from the valley; in effect, it was an enforced disappearance of the entire region of Kashmir. Genocide Watch, alarmed by the turn of events, issued an alert on the region.[14]

The Indian Government labelled the military siege as a vaguely benign sounding "lockdown" which was for the "good" of the Kashmiris, lest they come on streets to protest. Since protests are met by the Government with the use indiscriminate force, they become disproportionately lethal. The Indian Government was portraying

[12] Balu G. Nair 'Abrogation of Article 370: Can the President Act Without the Recommendation of the Constituent Assembly?' (2019) 3(3) Indian Law Review 254.

[13] Jeffrey Gettleman, 'In Kashmir, Growing Anger and Misery' (*NY Times*, 2019) <https://www.nytimes.com/2019/09/30/world/asia/Kashmir-lockdown-photos.html>.

[14] Gregory Stanton, 'Genocide Alert for Kashmir, India' (*Genocidewatch.com*, 2019) <https://www.genocidewatch.com/single-post/2019/08/15/Genocide-Alert-for-Kashmir-India>.

the lockdown as a means to safeguard Kashmiri life rather than a means to curb any potential protests which might have created a law-and-order situation and caused casualties. Such an eventuality would have complicated the narrative of normalcy that Government was trying hard to portray.

The valley was made to disappear into a curfewed communication black hole; the Indian Government's policy of curbing Kashmiri dissent by indirect and direct military action was a mega-spectacle. The Government and media continuously projected the situation on the ground as normal. The word "normal" said in the context of Kashmir in the Indian narrative is an antithesis of its meaning. For Kashmiris it has acquired the status of a slur. Massive protests were erupting from time to time, which resulted in more than 100 injured and several dead.[15] Kashmiris mainly protested through a civil boycott or *hartal* and voluntarily refused to engage in daily activities by staying indoors. The device of *hartal* as a means of protest manifests the haplessness of Kashmiris where a politics of self-injury often is the only way to show their resistance. While India kept boasting of accelerating development, the economic loss inflicted on Kashmiris by the lockdown was estimated to be upwards of USD 5.3 billion. Only small stores, vegetable vendors, and automobiles were operating for short durations to keep the essential supplies circulating. The region reeled under a humanitarian crisis—basic rights including healthcare, education, and economy were all suspended.

Re/Annexation not Integration

The Government of India declared that the "integration" of Kashmir was "complete". The word integration sounds so benign, but its violence is marked on each Kashmiri body—it is a wound that never heals. For Kashmiris, integration means seventy-two years of political trauma and subjugation inflicted by India. It means democracy deployed as "politics" with symbolic elections—a sham production involving India's own client-politicians, collaborators, sell-outs, and thugs. It means the UN mandate over Kashmir being sidelined; it means illicit elections which the UN (when they were first held) had deemed "out of order" and have since been used as a farce of democratic governance. It means these very elections being rigged—and the manufacturing of consent by propping up predetermined governments that favoured Indians hold over Kashmir. For the lack of a better categorization, such politicians are called "pro-India politicians" that Kashmiris see as client-politicians, collaborators, and traitors to the cause of self-determination and independence. In Mathematics, integration is a way of adding slices to find the whole. In Kashmir's case, Indian integration has muddled the math, it has sliced Kashmir into bits. In August 2019, not only was the region downgraded to a Union Territory meant to be governed directly from Delhi, but it has also been sliced into two: Jammu and Kashmir being one part and Ladakh the other. This, not counting the fragmentation that the Indian occupation's systemic and

[15] 'Annual Human Rights Review 2019' (*Jammu Kashmir Coalition of Civil Society*, 2019) <https://jkccs.net/annual-human-rights-review-2019-2/>.

institutional violence has wrecked on Kashmiri communities. While slicing Kashmir into bits, it formed its own whole, however incomplete and tenuous.

Since 1947, under the terms of the disputed treaty of accession (or *ilhaaq* as Kashmiri's call it) to the Indian Union, Kashmir was to be a quasi-independent territory and India had jurisdiction only over the matters of defence, currency/communications, and foreign affairs till the plebiscite was held. This was formalized through Article 370, which ensured that Kashmir had its own constitution and flag. India needed consensus from the Kashmiri legislature in all matters pertaining to the state. The accompanying Article 35-A safeguarded the territorial sovereignty of Kashmir, securing the right to employment, education, property ownership, and electoral franchise for the indigenous population. In the immediate postcolonial aftermath, the Indian Government used autonomy to placate deep-rooted Kashmiri nationalism but in the long run, was determined to "integrate" the region by hook or crook. The Indian Government deployed Article 370 as a Trojan gift which enabled Indian laws and statutes to be juridically imposed on Kashmir. Kashmir's governance, operationalized through clientelist regimes, ensured that New Delhi eroded Article 370 through administrative, military, and judicial means. It is telling that the word to control Kashmir in the Indian policy narrative has always been "handling" or "managing"—an evident colonial-speak for a region that has been as restive as a kitten in the hands of a cat thief. By August 2019, only a few symbolic parts and Article 35-A of the original autonomy treaty remained in force.

Kashmiris largely referred to the 1947 accession to India as a "*Jabri-naata*" (forced relation) imposed by the sole will of the fleeing monarch of the erstwhile princely state who was facing a large-scale rebellion. Many Kashmiris felt the removal of Article 370 was a relief from the forcible relation. Kashmiri resistance leaders have also long claimed that ending Article 370 would automatically free Kashmir from the Indian rule. In the past, legal analysts had observed that the removal of Article 370 would be a constitutional nightmare for India. Being the only mechanism that establishes Kashmir's status with its federation, its removal was seen as next to impossible. The Article was declared as a permanent feature of the Indian Constitution by the Supreme Court of India and the Kashmir High Court.[16] Some Indian jurists observed that the removal of Article 370 turned India's de-facto occupation into de-jure and put the already established relationship between the two in jeopardy. But the Indian Government, drunk on neoliberal ethnoreligious nationalism and with a tight grip on its people, behaved as a routine occupying force and did not desist from tampering its own Constitution and ignoring all legal ramifications. In any case, the

[16] 'Article 370 is Permanent, Rules J&K High Court' *The Hindu* (11 October 2015) <https://www.thehindu.com/news/national/other-states/article-370-is-permanent-rules-jk-high-court/article7749839.ece>.

historic precedent is that Indian governments have never honoured their constitutional promises to Kashmiris.

The Government of India's policy since 1947 itself manifests a "legal annexation" made possible by judicial means. In 1954, a presidential order extended Indian citizenship to Kashmiris, who until then were only designated as "Permanent Residents" of the dominion of the Jammu & Kashmir. Simultaneously, the Fundamental Rights of the Indian Constitution were also extended to the region, becoming one of the proverbial Trojan horses in India's larger policy of "legal" annexation of Kashmir. The Fundamental Rights charter of the Indian Constitution is unique in permitting preventive detention to curb threats on national sovereignty or public order. Rather than protecting citizens' rights, the charter has primarily enabled the Indian Government to control dissent inside Kashmir. This steadily criminalized Kashmiri resistance and the movement for plebiscite. A legal essay by Haley Duschinski and Shrimoyee Ghosh[17] analyses in painstaking detail how from 1954 onwards, India has used this feature advantageously to repress the Kashmiri sentiment for sovereignty. The authors illustrate how India legitimized its governance of Kashmir through legal rulings: calling it "occupational constitutionalism"—a form of legal incorporation of Kashmir that "became sedimented through the work of the courts across time".[18]

For the BJP, the removal of Article 370 has always been foremost on the agenda fuelled by its brazen hyper-religious and nationalistic roots entrenched in Hindu supremacy and ethnonationalism (or Hindutva). This enterprise is fully fuelled by the neoliberal order that aims to sustain India as a modern neocolonial force. Currently in India, the ideology of Hindu indigeneity which casts Muslims living in India as invaders and foreigners has taken a deep hold. In that equation, Kashmiri Muslims are doubly marked as the demonized other: first as Muslims, and second as Kashmiris who are long-standing dissidents committed to the fight for a UN-mandated plebiscite, democratic sovereignty, and freedom from India. In the Indian Government's necropolitical equation, Kashmiris are doubly killable bodies.

The BJP Government's disregard for India's own constitutional mechanisms and the protections for indigenous people's rights is nothing new for Kashmiris. Only the method is different in being the ultimate spectacle of military and constitutional annexation to strike terror in the hearts of Kashmiris. While the BJP executed the final removal of autonomy, the plan for Kashmir's evisceration and full integration, as already mentioned, has been India's not-so-secret national policy. Indeed, a minister from the Indian National Congress, the old political party with roots in British politics

[17] Haley Duschinski and Shrimoyee Nandini Ghosh, 'Constituting the Occupation: Preventive Detention and Permanent Emergency in Kashmir' (2017) 49(3) The Journal of Legal Pluralism and Unofficial Law 314.
[18] ibid, 34.

that ruled India almost uninterruptedly for 50 years, publicly boasted that they had diluted Article 370 twelve times without any controversy, unlike the BJP.[19] Indeed, they had done it through deft political and juridical engineering by using Kashmiri client-politicians and collaborators and did not rely solely on military might or broad tampering with the Constitution. Thus, except for disagreements on the execution, there has been a consensus across the board for the removal of Article 370 from Indian political parties that otherwise oppose the BJP. The BJP did indeed complete the plan which has been a part of the Indian neocolonial expansionist policy in the Kashmir region all along. The Indian Government, political elite, media, and masses stood united in the project of forcible occupation and integration of Kashmir through any means possible. The ease with which the Government changed Kashmir in such a fundamental manner using direct and indirect state violence and by reneging on its own constitutional promises, while still having the common masses onboard, manifests the necropolitical policies of India that have now been normalized for Kashmiris.

While the Kashmiri people see the removal of autonomy as an attack on their ethnic, religious, and national identity, the Indian Government, in a true neocolonial idiom, claims that it is for the good of Kashmiris and is needed to pave the way for "*vikas*" (development) and to root out nepotism and "terrorism". Yet India's own analysts have shown that the development indices for Kashmir were already high or showing improvement.[20] The Indian Government's arguments about how the removal of Article 370 will allow the implementation of corruption-free governance and a host of Fundamental Rights such as the right to education, minimum wages, social reservation, and minority rights act are misleading, disingenuous, false and strawman.[21] It is a reasonable question to ask, if this decision is about Kashmir's development then why were the Kashmiris caged for months on end and not celebrating on the streets? Instead, Kashmiris lament that the removal of autonomy is paving way for outright settler colonialism, dispossession of indigenous peoples, and the ecocide and exploitation of resources which will result in maldevelopment.[22] It is unfortunate that since August 2019 Kashmir continues to hurtle into a massive economic sinkhole.

Article 370 was a symbol of Kashmir's historical sovereignty and it served to underwrite the demand of self-determination by the Kashmiri people. Shamsudin, an

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[19] 'We Diluted Article 370 Twelve Times Without Controversy' (*India Today*, 19 November 2019) <https://www.indiatoday.in/india/story/we-diluted-article-370-twelve-times-without-controversy-congress-1615399-2019-11-03> accessed 12 March 2020.

[20] T.K. Rajalakshmi, 'Kashmir's Development Statistics: Nailing A Lie' (*Frontline*, 30 August 2019) <https://frontline.thehindu.com/cover-story/article29054385.ece>.

[21] Ather Zia, 'Straw Man Arguments and the Removal of Article 370' (*Asia Dialogue*, 2019) <https://theasiadialogue.com/2019/09/27/the-long-read-straw-man-arguments-and-the-removal-of-article-370/> accessed 30 July 2020.

[22] Ather Zia, 'The Haunting Specter of Hindu Ethnonationalist-Neocolonial Development in the Indian Occupied Kashmir' (2020) 63 Development 60.

old Kashmiri shop owner, observed that Kashmiris have stood for Article 370 and 35-A less as a loyalty to the Indian federation and more to protect their territorial sovereignty and keep Indian settlers at bay. Kashmiris of all shades feared the removal of autonomy, which they saw as a move not to bring Kashmir on par with other states but, in reality, as a removal of protective laws to usher in demographic change and alter the Muslim majority nature of the region. Even India's own client-politicians in Kashmir were by and largely unified against the removal of autonomy. Pro-India politicians from almost all parties called an emergency meeting the night before the removal was announced, but by then any show of unity was too late for the Indian Government's plan.

Weaponizing the Pandemic

In the early March 2020, Kashmiris were partially hobbling back to life from the long military siege and communication lockdown. It was after more than 7 months that the Indian Government had functionalized some cell phones and allowed access to whitelisted sites only through 2G internet. While the world began actively fighting Covid-19, the Indian Government decided to go ahead with the winter games that were to be held in Kashmir from March 7-11, 2020. Hundreds of sportspersons poured into a scared and scarred valley. On March 25, India imposed a reactionary pandemic lockdown. For Kashmir, it was nothing new. A young Kashmiri banker observed: "We are used to it; it is not much different, except this one might be saving our life!"[23]

While the reaction to the pandemic lockdown was more or less favourable, it did not turn out to be a panacea from the necropolitical state. A new media policy was imposed, arming the authorities to empanel journalists and media outlets, decide what is false news or incitement, and based on compliance assign government advertisement which for many newspapers is a major source of funding. Strict censorship has been a historical reality in Kashmir, but now it is fully institutionalized and legalized. Journalists are increasingly incarcerated, beaten, humiliated, and harassed. Recently, some were booked under terror charges with arbitrary allegations pertaining to incitement, fake news, and sympathizing with Tehreek and the resistance movement. The charges reeked of harassment, prompting the United Nations special rapporteurs to send a missive to the Indian Government expressing concern over the working conditions of journalists in Kashmir.[24]

The pandemic provided a perfect foil for the Government to step up counterinsurgency operations. The Cordon and Search Operations (CASOs) went on unabated. During CASOs, the Indian forces enter neighbourhoods and communities under the pretext of searching for militants. This is an operation filled with soldiers

[23] Interview with K.A.D. (Personal Communication, 26 March 2020).

[24] Khalid Bashir Gura, '3 UN Officials Take Up Case of 4 Kashmir Scribes with Delhi' (*Srinagar*, 16 July 2020) <https://kashmirlife.net/3-un-officials-take-up-case-of-4-kashmir-scribes-with-delhi-240158/amp/>.

creating mayhem in people's homes; arresting, beating, humiliating, physically and sexually harassing civilians. Armed encounters with militants are continuing during the lockdown. Routine surveillance, patrolling, frisking at checkpoints and convoy movement have not ceased. All this despite the United Nations calling for the cessation of violence in conflict zones across the globe. And if this was not enough, India and Pakistan began fighting on the Line of Control. The Indian Army moved its artillery into civilian areas, expanding the battlefront into the community. Locals began protesting this move, which made them de-facto human shields. In a matter of 48 hours starting April 11, 2020, three people on the Jammu and Kashmir side and in two in Azad Kashmir were wounded and some residential houses were destroyed. Despite the pandemic advisory of staying indoors, locals had to flee from the neighbourhoods where the Indian Army has deployed its artillery.

A mid-year report released by the Jammu and Kashmir Coalition of Civil Society (JKCCS) revealed that between January and June 2020, Kashmir witnessed 229 killings, 107 CASOs, 55 internet shutdowns, and forty-eight instances of property destruction. The report observed that the destruction of civilian properties during encounters saw an increase during the Covid-19 lockdown, rendering many families homeless and without shelter. A Kashmiri survivor of one such encounter said, "Corona is not our main worry; it [virus] might have mercy on some of us, but Indian occupation is bent to annihilate us all".[25]

A few years back, the BJP Government was considering putting curbs on militant funerals that are seen as emotionally charged sites where the Kashmiri resistance proliferates. It was proposed that the burials would be done "in camera" and open to only close family members. The Covid-19 protocols came in handy to deny handing over the dead bodies of the militants killed in encounters to their families. The authorities claimed the new procedure mandated the norms of social distancing. The irony of enforcing SOPs for saving Kashmiri lives from the pandemic was not lost in a place where the Indian necropolitics ensures that "small doses" of death[26] occur each day in addition to encounters, shootouts, and massacres.

Even though the Supreme Court of India has agreed that internet is a Fundamental Right,[27] the facility was not restored fully in Kashmir. This has had multiple implications for the patients and healthcare providers who cannot access online resources. Overall, the internet shut down has been the cause of physical, educational, and economic death of the Kashmiri masses. This imposition does not seem like the hallmark of a government that seeks the welfare of the people for life, but one that marks them for death.

[25] Interview with M.Y. (Personal Communication, 22 May 2020).
[26] Mbembe (n 2), 36.
[27] *Anuradha Bhasin v Union of India* 2020 SCC OnLine SC 25.

While the sword of the pandemic swings dangerously, the Government of India unilaterally continued to change the laws in Kashmir. It amended the domicile law which has opened pathways for designated categories of Indian citizens to become domiciles of the erstwhile state. The fast-track process even penalizes the local authority to the tune of 50,000 India Rupees if the domicile certificate is not issued within 15 days. This is the first time that a low rung bureaucrat will be individually penalized by the Government for not issuing paperwork within the stipulated time. Kashmiris attribute this urgency to the Government of India ensuring fast-track entry of the settler population; a move that constitutes demographic terrorism.[28] This demographic alteration on steroids is being imposed when Kashmiris are doubly quarantined and unable to lodge protests of any kind. The echo of "going the Palestine way" is no more a fear but a fearful reality for Kashmiris.

While the pandemic lockdown prevails on and off, the India government has thrown open tourism. Kashmiris were aghast at the irony of being locked up while tourists can freely come in and spread infection. While the cases of Covid-19 began to rise along with the daily mortalities, Kashmiris are grappling with the threats of war with China and the war clouds which are always looming with Pakistan; jails are choc-a-block, full-prone to rising infections and the Government is day in and day out changing and implementing new laws. A noted journalist remarked: "While trying to survive the pandemic, it is hard to keep track [of] the ways in which they [Indian Government] are changing Kashmir and the orders being circulated daily; we have been robbed of all agency and we cannot even express the level of helplessness we feel".[29] Indeed, none can. The police register an "open FIR" under terror laws for any criticism on social media against the scraped autonomy. Recently another "open FIR" was registered against the president of the erstwhile Kashmir Bar Association, who is languishing in jail, for commenting on a high-court judgment.[30]

As the one having power over life and death, the necropolitical Indian state has ensured that no one speaks against these unilateral decisions that are furthering the conditions of physical, psychological, and economic death in Kashmir. The necropower of who gets to live and who must die becomes key to understand the growing greed of postcolonial democracies rigged by neoliberal maldevelopment. The neocolonialist aspiration of the Indian occupation in Kashmir echoes this global condition and has created conditions for settler colonialism, mass incarceration, ecocide, and cultural destruction. The need of the hour is to understand India beyond the stereotype of biopower and governmentality; beyond the ideals of Ahimsa and Yoga, and more through a masculine necropolitical lens of imperial desire: that is so

[28] Hussain Showkat, 'Kashmir: Palestine in the Making' (Monograph, Kashmir Institute, Srinagar).
[29] Interview with A.B. (Personal Communication, 17 July 2020).
[30] 'J&K: Police Register "Open FIR" for Social Media Criticism of High Court Verdict' *Scroll.in* (10 June 2020) <https://scroll.in/latest/964301/j-k-police-register-open-fir-for-social-media-criticism-of-high-court-verdict>.

stark in Kashmir. The world powers, with ease, accepted India's fig leaf of an argument in repressing the Kashmiri people's will. They turned a blind eye to the unleashing of forced "(mal)development", neoliberal plunder, and settler colonialism on Kashmir. This manifests undemocratic repression and constitutional colonialism which will be the bane of shared global futures riven with necropolitics. Even the alert put out by Genocide Watch was conveniently ignored. The humanitarian crisis was allowed to worsen so much that even the medical journal *Lancet* published an editorial on the military siege. Currently, with the pandemic reaching its peak in the region, Kashmiris are between the hell and high water of the necropolitical desires of Indian neocolonialism. And there is dead silence about it.

HOPEFUL RANTINGS OF A DALIT-QUEER PERSON

Dhiren Borisa*

Two years have passed by. Law, in a much-celebrated verdict, had acknowledged our sexual citizenship in India. Still, I am afraid, I can only represent an unpopular opinion in the queer movement. I can only share stories from the vantage point of a Dalit queer person. My humblest apologies if it doesn't feel celebratory enough of *Navtej Singh Johar v Union of India*.[1] I want to put across that the LGBTQ+ movement or what has come to be known as the gay agenda works for us no different than the courtrooms that often acquit the perpetrators of caste violence inflicted on many in my community. Our lives beyond law are more complex and the tactical moves that lawyers adopt to win cases are often an erasure of these complexities.

So be it; in 2018, when this victory was achieved, let's also remember which voices were foregrounded and which voices were removed from the petitions. Let's recall how respectability was played up through the caste and class privileges of certain petitioners and how sex workers were asked to tone down, or better leave. What does it reveal about law and justice? What does it speak about rights and citizenship—about who can claim them? Indeed, what does it say about us as the queer movement?

Many promise of a magical trickle-down, an inverted funnel through which rights will mystically flow in a top-down manner. We are told that there is a hierarchy of oppressions. Everybody will reap its fruits. This trickle-down, however, is a false hope. Queer movements like our courtrooms care not for everyone but only a few who "deserve" justice and rights.

Many of us are just residuals. Rights sieve through our bodies but do not touch us in the same ways as judgments promise.

We are tired of being the residual of the queer movement and will no more remain its nondescript fringe. This movement is ours to claim. If sheer numbers are to be taken, then it is already a false premise that even queers were offended with in 2013 when the Judge asked the lawyers in the courtroom "if they knew any gays", because he definitely didn't. If we are to remain mired in numbers, should we then

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[1] (2018) 10 SCC 1.

even worry for the rights of this so called "miniscule minority"? Must we take the same logic ahead just because visibility for cis-gendered gay bodies come with privilege and access, and the visibility of trans* and non-conforming bodies results in routinized violence? As Dalit Bahujan Adivasi queers, we know where our solidarities lie. For we have been historically denied the respectability on the backs of which rests this victory that we celebrate. For many of us "coming-out" as Dalit has been more difficult a journey than "coming-out" as gays. You won't see many of us in your fancy parties that imagine inclusivity through gatekeeping. Some of us might secure entry because we have claimed some access through education and mobility. Yet we must still hide our social locations to assume desirability. In fact, if sheer numbers are to be taken in terms of demographic proportion, then Dalits, Bahujans, Adivasis should also make a majority of the queer population. But we cannot be visible. Some of us cannot afford the same means through which queerness is now globally legible. Many of us you do not want to see and touch because it takes away the glamour. Many of us you kill and humiliate because they are trans*, while all of us continue to live in shadows of the humiliation that you serve us every day through caste oppression. This movement is not queer till it's for everyone. Angela Davis called for the intersectionality of struggles and not only identities. Its only there that true celebration lies.

On the pride mailing list of a major city in this country, there is disdain for the anti-caste flag. People question why a few carried it in the pride. "Why do we dilute the queer movement by bringing in caste and misplace our agendas that should rightly focus on gay suicides, adoption rights, and blood donations?" All of these are important issues—so are housing and labour rights and dignity—but none of them are mutually exclusive from the various other marginalities that amplify these problematics. When one creates such hierarchies, we are again treated as a residue. Again, erased and asked to leave the party. Lest you forget that we are also queer and lest you forget that had it not been for a Dalit person writing the Constitution of this country and ensuring the possibility for the judges of 2018 to grant us what we celebrate today, there would have been no rights and no party tonight. Queer movement owes immensely to the anti-caste movement.

In another major city pride, when a few students raised slogans against the ruling regime's Citizenship Amendment Act that excludes one minority, the "elder" gay activists labelled these students as seditious and anti-national, primarily to distance from such voices that taint the rainbow flag. Let me remind you in the humblest way possible that it doesn't remain rainbow anymore. Your flag might be saffron—and saffron is a beautiful colour—but it is steeped in crimson blood. It archives how in the same moment when we proclaim ourselves as a minority and seek sexual citizenship from law, we simultaneously minoritize our own people and efface those who are also queers. The queer movement is not just in the pride parades and parties but in the long roads that migrants walked to go back home during the pandemic. Many of them would have had "queer" desires. Their lives, by virtue of their precarity, are already

queer. The state doesn't care about them like it doesn't for us. It just cares for a "miniscule minority" that can easily be co-opted for its neo-liberal political gains.

The queer movement lies in the protests of Shaheen Bagh where Muslim women, like many of us who dread but feel free when we go to prides, were protesting against the denial of citizenship. Today, when we celebrate two years of some kind of citizenship and recognition that we have earned through law, let us not forget that there is no difference in "their" rights and "our" rights, except the distances we want to create and maintain.

I am sure many reading this today would feel, like the two powerful upper-caste queer lawyers who declared so in an Oxford Union address, shouldn't the next natural step be our fight for gay marriages? Much like the United States order in *Obergefell v Hodges*[2] granting the right to marriage and our rainbow profile pictures on Facebook. Recently a group of LGBTQ+ activists approached the Delhi High Court for recognition of gay marriages within the Hindu Marriage Act. While many from within the movement questioned the intentions of these activists and their right-wing affiliations, the response from the Solicitor General stated that same sex marriages are against Indian culture. What do marriages mean in the Indian context? What do they tend to hold together as culture? – patriarchy? Patrilineality? property? Does the voice of these petitioners disrupt this social reproduction? I want to bring in Dr Ambedkar again and his lecture at Columbia University on the genesis of caste, where he vocally stated that "caste is endogamy".[3] When our queer spaces and modes of desires are already shaped through caste, class, and other power dimensions, what change is gay marriage going to bring except strengthening the caste regime? Don't we always fall for the rich and classy, the well-dressed in the party, the presentable and the respectable; all of which comes from caste and class histories? Don't we see people on Grindr flaunting their caste identities, where "Jaat" and "Gujjar" in North India and "Reddy" and "Gowda" in some parts of the South become markers of sexiness and desirable bodies? What difference will the demand for marriage bring but a celebration of respectability through the maintenance of our caste pride?

Caste is the currency through which sexuality is traded in India. Can our struggles for more recognition and rights for sexual heterogeneities assail this element? Intersectionality is not some game of addition and subtraction. Our identities and experiences are interlocking and co-constitutive. I often jokingly say it is like a *khichdi*. My identities are messy like a *khichdi*. There is no easy separation possible, neither it is as simple as adding some of us to a political agenda and stirring it to appear more "inclusive", or as the buzzword is, "intersectional". However, unlike the easy digestible nature of *khichdi*, I often wonder why aren't our voices so easily digested in the

[2] (2015) 576 U.S. 644.

[3] BR Ambedkar, 'Castes in India; Their Mechanisms, Genesis and Development' (Lecture presented at An Anthropology Seminar taught by Dr AA Goldenweizer in Columbia University, 9 May 1916).

movements we participate? Beyond cosmetic remedies of acceptance and tolerance, should we not aim to radically disrupt the structures of power that keep us in place and hold us back? The story is not merely of an erasure of some identities that we speak of from the political movements in which we are invested, but how our movements themselves lack imagination to hold our complexities together. The key is to recognize that if the sustenance of the compulsory heteronormative family as the "natural" cornerstone of our society disallows an imagination for queer desires to be seen as equal, and such is maintained through the institution of marriage that reproduces caste and gender relations in India and sustains hierarchical material conditions, how can the queer movement afford not to be anti-caste? The critique also applies to anti-caste spaces where queerness is seldom acknowledged and has now come to mean, especially in emerging Dalit-Bahujan-Adivasi student-led movements, an additional identity category to fight for. This complicity is possible, as I mentioned earlier, if our priorities are only cosmetic re-adjustments within the existing systems of power. Such designs will always leave many of us outside the doorsteps as we build our house of justice and equity through social change.

Last year when we celebrated one year of this victory, trans* people were fighting for their right to self-determination against a bill that claimed to protect them but didn't feel necessary to include them. Two days before the Delhi pride, a protest was called at the same place where the pride was supposed to culminate. Only thirty people showed up to this protest, against the 7000 that walked in the pride. Where are our priorities? Where is the queer movement? Is the celebration of this verdict just a celebration of a moment and not a movement? Because for sure it has erased the contributions of trans* people and sex workers and the women's movement and the anti-caste movement to make this moment even imaginable. When the LGBTQ+ pride can conveniently choose to ignore the *T* that is a part of its acronym, I dare say, I have very little faith that it would remember the Dalits, Bahujans, Adivasis, and Muslims that make a majority in all of these categories. As the Combahee River Collective statement said in 1977, nobody of us is free until every one of us is.[4]

I will end with a poem. Because we are often asked to show numbers, some of us are always minoritized when we seek justice from the courtrooms and movements that we are deeply invested in. This is my poetic response. Because many of us, even when want to, cannot afford to come to your celebratory party—because you do not want us to.

Yet again today
You pulled me down
Through numbers;
You choked my throat
And silenced me

[4] 'The Combahee River Collective Statement' (1977) <https://americanstudies.yale.edu/sites/default/files/files/Keyword%20Coalition_Readings.pdf>.

Like every other time
With names;

That did not resonate–
I could not relate to,

But which told me
Rather reminded me
That I don't belong here...
In this space
Which I otherwise inhabit daily
Or the "bodies" I otherwise live in.

Till the time,
I can also produce with me
An army of numbers...
Like the bodies
That walk the streets
As if they own them;
Forgetful of what and why
Gives them this visibility
This power to tell me–
That I will never have it
Or do I even need them?

So, that's it!
Isn't it?
Till then, I should be silent
Let the norm have the last laugh
Why don't I just fuck off...!

Yet again, today,
Like every other day,
You pulled me down,
You pushed me away
You walked over me
My bodies, our bodies,
Visible bodies, invisible bodies
Invisibilized bodies.
Dead, alive,
How does it matter?
Matters is your walk...
Which overlooks my kind
Like a voyeur does
Such is a privilege of distance,
My friend!
You won't understand.
Just tail end nibs
Of your rainbow feathers,
What about us? you call–
Your "intimate", but "others".

BOOK REVIEW SYMPOSIUM: *CONFESSIONS OF THE FOX*

QUEERINGS*

Oishik Sircar**

This novel—and I'm using this classification as a temporary placeholder for an increasingly unstable yet resilient genre—is about a chanced upon manuscript dated 1724 which carries the confessions of Jack Sheppard, "an English folk hero and jailbreaker" in an eighteenth-century London. This is a London that offers a counter to ahistorical literary imaginaries of a "uniformly white city" and is presented as one that is "shaped through centuries of Black and South Asian communities and labor". Sheppard's trans identity, training as a carpenter,[1] heists, fugitive exploits, friendships, betrayals, incarcerations, and most importantly his relationship with Edgeworth Bess—a Spinoza reading sex worker of lascar descent who is his lover, partner in crime, ethical compass, political comrade—are what constitute the confessions. The manuscript contains the stories of Jack and Bess' tender and charged erotics, their rebellions against an imperial penal administration set in the backdrop of a racialized plague scare in a highly securitized city that is forcing sex workers and non-white labourers into quarantine. Jack's quests lead to his arrest, but he lives to tell the tale after performing a miraculous escape from the gallows. But Jack didn't know how to read or write. So who recorded his confessions? And how did it reach us—those reading *Confessions of the Fox* (*Confessions*) now?[2]

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* Editors' Note: This is first of the three reviews in the Book Review Symposium on *Confessions of the Fox*. It is succeeded by Shals Mahajan and Rahul Rao's reviews and the author Jordy Rosenberg's response.

** Associate Professor, Jindal Global Law School <osircar@jgu.edu.in>. In a non-academic avatar I curate photos of objects and ideas (not of people) on Instagram that forces multiple filters on images to present a hyper-stylized diary of a dystopic present <https://www.instagram.com/a.filtered.life/>.

[1] This is a premature aside: Jordy Rosenberg's father was a carpenter—and there is a subliminal story of inheritance and assemblage in the book that informs Jack Sheppard's carpentry skills, which is not incidental to either his character or the construction of the novel.

[2] It took me almost three months to finish reading *Confessions*—the slowest that I've been in recent times in finishing a book. The slowness was a result of a range of reasons extratextual to the novel, which included a long period of being unwell with a severe eye infection, care responsibilities at home, a pretty heavy teaching load, and a general inability to concentrate. And yet, I kept returning to the book almost every week to read at least a paragraph. The slowness of my ability to read frustrated me, but the slowness of the encounter with the book was generative of a reading practice that aided receptiveness and a heightened attention to the affective dimensions of my reading experience—of how I'd have to squint to read the smaller typeface in the footnotes; how I'd underline some words or references and stop reading to look them up on the internet and possibly not return to reading the novel on that day at all; how I'd keep a page open for a whole week without picking up the book since I last read it just to remind me that I am still reading. Only when I finished reading

Dr R Voth, a humanities professor at a neoliberal university—named the "University"—is the one who chances upon the manuscript at a book sale in 2018, taking place in the wake of three floors of the library being emptied out to optimize space for "deans' offices and a dining atrium for upper-echelon administrators". The University's operations are managed by a corporation called P-Quad Inc. that has appointed a Dean of Surveillance to track the activities of its faculty members to incentivize their productivity through publishing metrics, or make professors disposable. Dr Voth—like the author of the novel Jordy Rosenberg—is a trans person[3] and while reading the confessions a deep attachment develops between his sense of self and Jack Sheppard's. When the University administration learns that Voth is in possession of the manuscript, they sweetly threaten to file a lawsuit against him for stealing the University's intellectual property. His only way out is to submit a detailed annotated version of the manuscript to the University press that is run by P-Quad, which incidentally also runs a pharmaceutical company that manufactures the prescribed transition medication that Voth has to take. The Dean of Surveillance who oversees Voth's work on the manuscript is obsessed about making him find a detailed description of Jack's "human chimera" genitalia—in fact, an image gone missing because Voth himself has stealthily torn it off.

What we have then are two texts with two sets of readers attached to *Confessions*. The first text is the confessions manuscript whose reader is Dr Voth (who writes an editor's foreword with which the novel begins), and the second text is the novel written by Jordy Rosenberg (is he an approximation of Dr Voth?) whose reader is those like me. There are also two temporally separate, yet joined plot lines—the first is Jack Sheppard's fugitive life and times at the heights of colonialism in the heart of Empire, and the second is Dr Voth's own precarious life and times as he annotates Sheppard's confessions within the academic-industrial-pharmaceutical complex of neoliberalism. There are also two bodies—of Sheppard's and Voth's—that are transforming, transitioning, and transgressing. These corporeal intensities shared by Voth and Sheppard across space and time are not atomized experiences but ones that are—in line with some classic novelistic conventions—experienced through love, loneliness, sex, kinship, politics, failure, and redemption.

I didn't know anything about Jack Sheppard's legend until I began reading the book. Learning about his exploits wasn't necessarily engrossing—his characterization

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Confessions did I realize that the organic slow turn that my reading experience took was befitting of the form of the text. Possibly, I couldn't have read *Confessions* in any other way but slowly, with care towards not only the story but my attachment to it as a reader.

[3] Oh, the violence of naming to invoke a category that is always already the condition of language! Rosenberg, though, doesn't explicitly identify Jack or Dr Voth as trans. Yet both of them don't escape the reader's identification. In the first version of this review I appended trans with an asterisk—in later iterations I took that off. Why? To avoid misidentification? But identification as opposed to misidentification does not escape the tyranny of identity. Or am I feigning undecidability to make a virtue out of a lack?

somewhat was. In an at once hilarious, terrifying, and brilliantly written sequence where Jack undergoes a mastectomy without anaesthesia—Rosenberg demonstrates exemplary control over words and pace in that dizzying scene where pain and desire become indistinguishable. There are other appealing elements that stayed with me after I completed reading *Confessions*. Rosenberg's summoning of the atmospherics of a subalternized London offered fascinating historical insights—and can be read alongside China Miéville's *Un Lun Dun* (2007) for a countercultural feast of historical and speculative fiction. Bess' character—her Anglo-lascar heritage, her inheritance of the rebellious spirit of the nomadic "Fen-Tigers"—was far more engaging to me than Jack's jailbreaks. Bess is the friend in the gendered and racialized "other" without whose material, sexual, and political hospitality Jack's self-becoming cannot happen.

As an academic at a neoliberal university myself, I strongly identified with Dr Voth (a third layer of attachments perhaps) and with the nature of the project that the author Jordy Rosenberg undertakes through him. I'm particularly impressed by what Rosenberg as an academic-novelist does to queer the pitch of the conventions of what can be called the bourgeois world novel. Voth's annotations to Sheppard's confessions appear as footnotes right through the novel. Footnotes, a staple of credible academic writing, can be considered irritants in a novel. There have, of course, been several great novels written with an academic heft that have played with form— Julie Schumacher's *Dear Committee Members* (2015), Laurent Binet's *The Seventh Function of Language* (2015)—and in fact some also with endnotes—from David Foster Wallace's *Infinite Jest* (1996) to Zia Haidar Rahman's *In the Light of What We Know* (2014). But footnotes in a novel—that are on the same page as the "main story"—suggest purposeful interruptions to the conventional flow of narrative. The only other one that I have read is *Glyph* (1999) by Percival Everett, who incidentally, is also a professor of English like Rosenberg.

Dr Voth's (and by extension Rosenberg's) writing is embodied in the footnotes as a method for narrativizing broken lives in a discontinuous fashion. A reader, thus, cannot not acknowledge that no reading practice is ever seamless. We read novels with an illusion of smooth connections and transitions—improbable, fractured, or fantastic plotlines, therefore, get rationalized as magic-realist, experimental, avant-garde, postmodern or plain bad. Such an "arrangement into a mental scheme of categories," as Susan Sontag would hold, is a necessary outcome of our interpretive forms of reading that "tames the work of art… makes art manageable, comfortable [and]… violates art."[4] In *Confessions*, the footnotes are not mere adjuncts, but are as significant as Sheppard's confessions. In their placing at the bottom of a page, they build the foundations for the confessions.[5] This form demands a reciprocity from the reader where the novel cannot

[4] Susan Sontag, 'Against Interpretation' in *Against Interpretation and Other Essays* (Farrar, Straus and Giroux 1966).

[5] The narrative is constructed like timber would be cut, joined, and chiseled by a carpenter. In the performance of the craft, a carpenter does not value timbre over the saw, nails, screws, or glue. These

any longer be considered to be at the reader's service. Instead of offering a story that aids the task of reading, the form that *Confessions* takes is where the novel pushes back against comfortable reading conventions that allow us to value different parts of a text hierarchically. In Rosenberg's supple prose, the footnotes militate against how the major story tends to extract surplus value out of the supposed extratextual labour of the story's so-called minor dimensions. What the footnotes demand is an active use of a combination of "reparative" and "guerilla" reading practices—*à la* Sedgwick and Bohrer respectively—where you counterintuitively breathe and bite a text simultaneously. In *The Human Province* (1978), Elias Canetti writes: "Experiencing and judging are as distinct as breathing and biting." Rosenberg's writing makes it difficult for the reader, and rightly so, to keep these intensities apart in the task of reading. In other words, *Confessions* does not allow the reader absolution by trading the ephemerality of experience for the calculability of judging.

In *Confessions* the footnotes perform three roles. First, they offer a charming training in an eighteenth-century creolized London vocabulary, *inter alia*, of sex. Just to illustrate: "quim", "muff", "Tuzzy-Muzzy", "Fruitful Vine", "O God of the Boiling Spot", "God of the Mono-syllable", "O God of the Water-Mill", "customs-house" are all expressions for the "pussy"; "red rag" is "tongue", "doxies" are "sex workers", a "bat house" is a "brothel"; "arborvitae" is "penis", "clicketed" is "copulation", "cadger" is "copulation without emission". Second, they offer detailed references to academic works that Dr Voth is drawing on from "decolonial and postcolonial studies, critical race studies, Marxism, and queer and trans theory"—whose full references appear under a section on bibliographic resources at the end of the novel, as is the convention in academic works. Third, and this is crucial, the footnotes tell Dr Voth's story in first person—of the precarious conditions of his academic life, his troubled romance, his medicalized transitioning, and of course, his growing attachment with Sheppard's confessions. Voth writes his memoir in the footnotes, directly addressing the reader, as he reads and annotates the confessions.

Confessions might be read in the tradition of the "anti-novel" in Bengali writer Subimal Misra's works. It tries to do for the English novel what in recent times Maggie Nelson's *The Argonauts* (2015) attempted with the memoir. Rosenberg wants to play with the limitations of the novel form rather than trying to dissociate from the genre. "This is a novel…" he categorically states in the acknowledgements. The book to me, thus, is an assemblage of a novel-memoir-monograph.[6] As a reader I felt happy to find the three genres of writing that I mostly read available in one. Yet, even if I knew that elements of all three genres are present, I couldn't with certainty identify when and

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are not adjuncts or outside the chair or table, like the footnotes in the novel are not just fugitively present. Much like the chair or table, this suggests that the novel too is assembled and its components can be taken apart and put to other work—in and through the practices of reading and writing—to be made into something else, somewhere else.

[6] The inescapable haunting of categories in the naming of genres!

how the transitions from one to the other happened. And every time I'd try to tame the form to make it manageable, the feral nature of the text would *escape* attempts at keeping it captive within my interpretive frames.

Escape is an important trope.[7] As the story closes in on Jack's arrest, the Dean of Surveillance's pressures increasingly suffocate Voth. It is at a time like this that he finds a clue that suggests a possibility that the text is not the truth about Jack's confessions. It is not Jack's "singular memoir" but a form of "plitho-hypomnesis, or: collective-diary keeping". And the collective improvements to the confessions was carried out by an underground group that "sought to liberate—rather decolonize—those texts under ownership of university libraries". And Voth, through his annotations, has organically been recruited in advancing this task. Decolonizing then does not any longer remain an epochal event, but a slow activity of repairing a text through reading and writing.

As Jack escapes from the gallows, Voth escapes from the captivity of the University with the manuscript of the confessions to the undisclosed location where this group operates. And the reader in me is incited to confront, actually acknowledge, the power of fabrication in narratives of liberation. Histories of domination—which include domination through hegemonic practices of interpretation—needn't only be resisted with truth, but with re-imaginations that unsettle any virtuous claims to historical veracity, archival authenticity and authorial propriety. Both in the acts of writing and reading, fabrication can be reparative. In effect, the reader—as comrade and consumer—becomes complicit in this strategy of liberatory fabrication independent of authorial intent. The text becomes the tactile site for enacting what Saidiya Hartman would call a strategy of "critical fabulation" that aims "to jeopardize the status of the event, to displace the received or authorized account, and to imagine what might have happened or might have been said or might have been done."

Confessions might be read as a queer novel because of the queer identities of its protagonists and its author and its trans themes. Such a characterization will perform an impoverished identitarian reductionism of its polyvalence. *Confessions* is a novel of queerings that makes us—to draw on JK Gibson-Graham— "read for difference rather than domination." It's a novel that queers the novel; queers the commonsense of literary and academic genres, and the arrogance of the archive. Most importantly, it queers the practice of writing and editing; of reading and the reader—Rosenberg appositely dedicates the book to Victory Matsui—his reader and editor for their "shared labor of writing". Queering is always already contingent and truncated—it works against the finality of form and is hospitable to incompleteness.

[7] Every jailbreak and heist in the novel are made possible due to Jack's carpentry skill.

Confessions, as a living artefact, escaped my haptic captivity when I turned over the last page and put it back on the shelf a few months back.[8] Now it sits there with the dog-eared pages carrying copious amounts of my pencilled annotations, alongside Dr Voth's. I only realized while writing this review that by drawing the reader into adding to the "collective diary-keeping", the book's affective trace has made me captive in my own fetishizing of its "partial and fallible" fabrications.

[8] This was in late 2019, much prior to when the Covid-19 pandemic-related lockdowns began in India in March 2020. Unlike Shals Mahajan and Rahul Rao (the other participants of this book symposium), I did not re-read *Confessions* to write this review. I was tempted to return to my pencilled notes, but imposed restraint. I did not want to authenticate my memory of reading through the conventions of citation. I did this not with any arrogant vanity, but because I wanted to take seriously the sentence with which *Confessions* ends: "*You will not need a map*" [emphasis in original]. I wanted to try and write a review where I returned to the text by playing with fidelity, fragility, and fabrication—how else does one travel with memory but without a map? I did have the book beside me through the period of writing. I'd treat it as an archive only to take me to the pages from which I wanted to quote verbatim. I did not want to contaminate the original version—the authority of the author—in trying to paraphrase from memory. After all, as Dr Voth writes in another footnote, drawing on Derrida: "the archive does not preserve so much as occupy the site of the destruction of memory." As readers we are complicit in this project of destruction even as we resurrect the archive in polysemic ways: why else do we yearn in equal measure, when we read, for the authentic and the fantastic? Is that an inescapable double bind? *A luta continua*.

WRITING AGAINST THE VIOLENCE OF HISTORY: A READING OF JORDY ROSENBERG'S *CONFESSIONS OF THE FOX*[*]

Shals Mahajan[**]

Your history gets in the way of my memory.
I am everything you lost. You can't forgive me.
I am everything you lost. Your perfect enemy.

— *Farewell*, Agha Shahid Ali

I first read *Confessions of the Fox* in December 2018 and I was blown away. I read it in a somewhat exhilarated state of mind. To get a book about rarely written queer lives, in which the politics one is living and trying to understand is actually embedded, is such a rare thing that when you find it, you stop everything and jump into it. I read it for the second time when I was asked to write this review. It was right in the middle of the lockdown due to the Corona pandemic, by itself a strange space to be in, likely to go on for the next few months.[1] Through both these readings, sometimes the same and sometimes different aspects brought joy and resonated. There is a contemporaneity

[*] *Editors' Note:* This is the second review in the book review symposium on *Confessions of the Fox*. It is preceded by Oishik Sircar's review and followed by Rahul Rao's review. The symposium ends with the author Jordy Rosenberg's response.

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[1] Those of us privileged enough not to have basic survival concerns are looking from the outside in, with a growing sense of unreality. While we sit in our homes, kept safe by the labour of those who are providing us with what we think we need (since there is a world of difference in what is essential from location to location), there are millions with no work, no rations, and no way to go back to their homes in their villages. As I write, there are people walking towards home, hoping to cover several hundred kilometres on foot in the hot May sun, with no food and hardly any water, and no support from the administration. It feels unreal to sit and write about rebellions elsewhere and speak of resonance. At this point we are the vultures, the tools of oppression, the undeserving living.

to the book that is actually disturbing. A historical romance from 1724, *Confessions* should not feel so present. And yet it does.

The characters are located in eighteenth-century London, and I, the reader, in twenty-first-century Bombay. The worlds are separate. And yet, here is a book that sees the connectedness of even these two cities and their histories. The racial, colonial, economic connect is so well woven that if I were writing a novel based in eighteenth-century Bombay, I too would be talking of some of the things that form this book.[2] Or maybe I would talk about these even if I were writing about the present, a time made worse by right-wing states being concerned more with surveillance and arresting those opposing them, than with the reality of people's lives and survival.

Confessions is not written from the eye of the colonizers or those in power. The locations of the protagonists (and here I am talking of Jack and Bess), as well as those of the multiple tellers of this tale, make it so that the stories from London too are told askew. We hear of the lives affected by these enterprises of colonization, of economic subjugation of other countries and peoples, and the expansion of the industrial and military powers. I love the way the economists, stockjobbers (what a great word, so much more fun than stockbrokers), the militia, the clergy, the police and the administrators are ridiculed and their powers constantly looked at critically. Bess and her being lascar, the history of rebellion of the fen-tigers that she comes with, the constant suspicion of anything official, anyone in power, any policing activity—all these speak powerfully to me and to our histories of struggle across these oceans and seas. The twenty-first-century narrator and scribe, Voth, shares in this rebellion as does the form, the very writing of the book itself.

It was during my second reading that I had more time to think about this narrative that does not set out to be seamless or smoothly woven. Add to that footnotes, and you have a device that might send a few readers away. For me though, having actually run away from academia (English Literature, what else?) after a couple of Masters' degrees, this is the only way I'd pay attention to footnotes. To my utter delight, they bring in more stories and even when they get a tad academic, they remember to veer back to the narratives at hand and add to them. These speak to the reader variedly, at all points.

Initially, it was the figure of Jack, the queer, trans, intersex masculine person at the centre, a figure of legend and stories, made suddenly mine/ours/like us—and his story of romance and adventure with Bess—that made it an immediate queer favourite and resonated. As with the book, this resonance is not just with my queerness, my gender-queerness, but also with the "us" that we queer-trans folx inhabit in the here

[2] This review is preceded by Oishik Sircar's comprehensive and eloquent one, where he talks about the book in fair detail. This leaves me free to jump directly into my reading experience. But, reader, in case you are bewildered with my lack of detail about the book and assumption of familiarity with the characters, I hope you read the first review before plunging into this one.

and now. It speaks to the space where we search for our stories and histories with each other and create common and yet uncommon narratives. This is what makes it almost impossible, for a reader like me, to imagine that I am *not*/ that we are *not* the intended readers of the book. Of course, we are not Sullivan or the University, or Andrews, or even Ursula, though we could be the ex. We are not just Jack and Bess and even Voth,[3] but our "we" is connected to the "us" of the book, the stretchers, the not-archivers, the queer trans folx writing themselves and reading themselves into the books that are ours. Throughout time and in the here and now.

In both my readings of the book, there were particular queer trans moments that I was struck by. The "something-ness" of self, of his body, of his being, with which Jack can only feel most at home when it finds space with Bess, is something (eyeroll) that many of us will recognise feeling. The same goes for Voth with his ex. Though these moments seem to have now become commonplace, it is important to remind ourselves that they are still not part of a common language accessible to many who need it. The recognition of oneself when someone else sees you, while being part of even the most annoyingly normative of romantic tropes, is a different thing when you have no words to name yourself. It is a different thing when you constantly live in a space alongside or in conflict with your body, with no way of knowing how to inhabit it.[4]

There is also Jack's separation from Bess. He realises that her revolution means him not having access to the substance that, besides her, makes him feel more at home in his body, but the process of creating it undermines everything that he is. As Jack

[3] Another point of resonance. An ex and I got in touch and started writing to each other after a painful gap of a couple of years. Very normal queer stuff to do in a pandemic, practically by the book. There must be a footnote about it somewhere in the four-dimensional queer archives of the stretchers on this. And since reading and literature were the thing we did together, we decided to read this book jointly. The first time around (end of 2018), she had seen my social media post raving about the book and read it (as I'd hoped she would). The second reading, then, had several added layers: the anxiety of the pandemic and worsening situation; the leisure of listening to some chapters and then reading, the exchanges within the recordings; the excitement of sharing the reading, and the joy of being in touch again. All this, along with the focus a second reading brings. But every time Voth told his ex's story in the footnotes, I giggled a bit. Somewhere along the line, I'd named the ex's folder in my email "the ex-files". So, this whole discussion with its umpteen emails back and forth was going into "the ex-files". Funny enough, though, since I'd forgotten to make a filter (not expecting that we'd be in so much conversation again), they did not go to their "ex-files" directly, but I had to shift them deliberately each time. This reading, then, is also dialogic.

[4] A little more than a decade ago, some of us did a study on the lives of queer/trans* folx (assigned female at birth) and their negotiations and interactions on/ with/ about/ of gender. Again and again in our interviews we heard narratives of how falling in love helped define/ know oneself; but also about the rush of it, the joy, the headiness and the recognition of the queer gaze, the messiness of bodies, and more so, the unacknowledgedness of the intersex bodies and the trans selves. *See* Chayanika Shah, Raj Merchant, Shals Mahajan and Smriti Nevatia, *No Outlaws in the Gender Galaxy* (Zubaan 2015).

discovers to his horror, in the absence of the co-operative, the time, and the attention-consuming processes that make it possible to achieve the original substance which Okoh brought with him, the substitute that Dr Evans and Wild are providing is created by grinding gonads of dead bodies in the "house of waste". And his are next in line. The blowing up of the ship is as inevitable[5] as the survival of the heroes, and this reader is grateful for such endings too. There are too many dyings and deaths in queer stories. And dying young is our peculiar specialty. But so is surviving to fight another day.

The narrative of the manuscript, and the many parallel ones, appeal just as much to the activist, the queer trans feminist fellow in me. They bring texture. They hold together the multiplicities of experience that one is always trying to articulate and to bring into the opaque languages of rights, law, and medicine. The book that Bess has been reading (the chapter on "Sexual Chimeras" in Ephraim Chambers' *Cyclopaedia*) and Sullivan's insistence on the missing page highlight the medico-social obsession with revealing the different body. The sensibility of the writer/s of the manuscript, as well as Voth's, lean towards not wanting to give details of genitalia, something that queer trans and intersex movements insist on not doing as well. They narrate the shift in language and focus that happens when the articulation moves from structures of power to people themselves.

And indeed, there is no real separation between Sullivan's demands for the missing page of the manuscript (deliberately lost and then replaced by a swollen slug image!) and the screening committee that the Indian State insists that a transperson must appear before to verify/prove their gender.[6] They are both part of the corporate-state-legal-surveillance project in which we all live.

I read this book as a direct attack on those mechanisms, on the history that is given to us, the history that has always done us violence. That is why it matters that the writing is never singular. The voices speaking keep growing even though only few are introduced to us by name. These are the narrators who are named (Voth, Bess, Jack, Okoh), the texts and lives that are included and referenced (from Sylvia Rivera to Svati Shah), and the web of stretchers who remain unnamed. This is the opposite of history as violence, of the archive as selective, and of memory as always normative. It resonates with the colonized as queer and trans folx, as those who've always struggled

[5] Would not we all like to blow up the ship of the capitalist-casteist-pharma-legal-state apparatuses that continue to desire to control and define our bodies and our beings?

[6] The Transgender Persons (Protection of Rights) Bill 2019 was passed in India by both houses of the Parliament last year, despite sustained and widespread protests and petitions by trans folx and our allies. While the whole Bill is flawed and dangerous, this particular section legislates that instead of self-identifying one's gender, a person must submit an application to the District Magistrate for a legal recognition of one's transgender identity. Further, it makes getting an ID as male or female dependent on first registering as transgender, and then supplying proof of surgery.

not just to find our histories, but to articulate our stories, to find and create a language for us. It creates something that speaks as both present and past, history and memory.

It is precisely because of the politics of the writing that such resonances can be felt from 1724 England to India in the 2000s. Jack and Bess both come to the "Shards of Metropolis" to find their own selves and also each other, just as queer and trans folx now, at times singly, often in couples, run away to cities and to the nearest metros and there chance upon other queer folx. It speaks to being recognised and recognising, finding something in common, even without having had the words till then to name themselves. It speaks as well to the different trajectories of the cisgender queer person's and the trans person's journeys to themselves and to each other.

For the reader in contemporary India, questions of authenticity, of confessions, of who is/ are writing, become enmeshed with a similar experience of recognition and deepening investment that Voth records. The questions of who listens, who reads, who is chosen to be told the stories, to whom one gives an account of oneself, and for whom the stories will be legible are as much part of the reading of the book as they are of the writing of it. The act of reading for me was like adding another layer to this queer trans palimpsest. One becomes a participant as well in this precarious and rollicking tale, not completely sure who exactly one is, but just that one rightfully is.

THE INEFFABLE SOMETHINGNESS OF LOVE AND REVOLUTION*

Rahul Rao**

When I reread *Confessions of the Fox* at the height of the Covid-19 pandemic in London, all the references to plague leapt out at me. In eighteenth-century London, which provides the setting for one of the book's multiple registers, plague is less an event than a background condition structuring relations between the state and its subjects. In a typical scene, "the poorer parishes were lock'd down … the street teem'd with centinels. Several at every corner, shouting at coves to take to their quarters. They had scarves tied 'round their mouths and noses—their shouts muffled by rough Linen". Plague ships anchor in the Thames. Advised by the Royal Society of Physicians, the Minister of Public Health issues confinement orders whose violation risks incarceration in the notorious Bedlam asylum. Jack Sheppard might be the "greatest gaolbreaker and the most devoted, most thorough carouser of quim in all of London", but like you and me, he is paranoid about catching the plague ("What if the customs-house manager had plague and then touched some fustian and then Jack touched it and then—? *And then and then*"). Bess Khan, whose quim (pussy) he most wants, mutters darkly about the "securitizational furor" that the plague has elicited. She would know. Part Anglo, part lascar, it is bodies like hers that most attract the attention of the centinels, who are especially on the lookout for lascars and levantines suspected of having brought the plague to London on ships from the East Indies.

Against this grim backdrop of surveillance and cruelty, something magical blooms between Jack and Bess, fuelled as much by what they find in each other as by their inhabitation of an undercommons that is called forth by the relentless enclosures of their time and place. This is the domain of the urban poor and the unruly mob, the gender ambiguous and the wayward, the black and brown detritus of empire that washes up the Thames into the city that is fast becoming the centre of the world. Their great nemesis is Jonathan Wild, Thief-Catcher-in-General, whose profiteering protection racket organises both crime and its punishment. Life here is nasty, brutish and short, but what Hobbes didn't tell you and what Jack and Bess would have you

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* *Editors' Note:* This is the third review in the book review symposium on *Confessions of the Fox*. It is preceded by Oishik Sircar and Shals Mahajan's reviews and is followed by the author Jordy Rosenberg's response.

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know is that "revelry is the verso face of misery and Terror". Theirs is an exceptional time, marked by the birth of something that would later be called capitalism, by the emergence of the property form (hello, John Locke) and by a certain conception of the body. But more on that anon.

Two voices in the book alert the reader to what is at stake in the daring escapades of Jack, Bess and the bats, mollies and assorted figures with whom they cavort.[1] The first is Bess herself, who in Jack's telling has a knack for "conducting study at the crosshairs of violence—spinning speculation from wreckage". I'm suspicious of characters who seem to know that they are living through epochal shifts in real-time, suspicious that their analysis might be a retrospective projection onto events repackaged to look as if their meaning was glaringly evident at the time. But Bess's theorizing comes out of personal experience of devastation and loss. Having watched her parents die in the valiant and doomed struggle of the Fen-Tigers to prevent surveyors from draining the fens (marshlands) of eastern England to create arable land, Bess has seen up close the violence of enclosure and its terrible toll on ordinary people.

The other theoretical voice in the book, the voice that brings Bess and Jack's story to us in the present, is that of Dr R Voth, frustrated academic in the neoliberal university (what other kind is there?). When in one of its characteristic gestures of contempt for the humanities, the university decides to empty the upper floors of its library to make space for swish offices for administrators, Voth chances upon the lost memoirs of the legendary Jack Sheppard. In a significant departure from the then known archive of Sheppardiana, this particular text seems to suggest that Jack was assigned female at birth. This remarkable insinuation sets Voth, himself a trans person, on a frenzied project of annotation that, he thinks, might culminate in the production of a text to rival in importance the memoirs of Herculine Barbin in the annals of transgender history. What begins as a labour of love, even survival, is quickly co-opted by the ever-watchful university in the person of Dean of Surveillance Andrews. Hauled up for "improperly utilized" leisure hours, Voth is presented with a "choice" between being placed on unpaid leave and producing a text that will be marketed as "the earliest authentic confessional transgender memoirs known to history".[2] The text is to be

[1] Readers concerned that their lack of proficiency in eighteenth-century cant might inhibit their appreciation of the text should relax: there are footnotes! Gorgeous, erudite, snarky footnotes.

[2] Voth exacts his revenge by inserting a copious account of the conditions of production of the annotated manuscript into its glorious footnotes. In that vein, reader, I must offer some confessions of my own. I wrote this review in a state of rage and frustration, broken only by the unmitigated joy that reading *Confessions* brought me. To cut a short story even shorter, the British university system is fucked. As the state has passed the burden of funding higher education onto students (now refashioned as consumers), universities have become ever more reliant on tuition fees and especially international student fees. The consequences of the marketization of universities have been intensified by the coronavirus, as a result of which it is widely expected that students, both domestic and international, are unlikely to enrol in their desired numbers, bringing many institutions to the brink of ruin. We are now ruled by accountants and their spread sheets, whose sole metric for the evaluation

published by a company called P-Quad, with which the university has recently "partnered", that also has interests in pharmaceuticals. P-Quad and the university want to release the text in conjunction with the launch of a new pharmaceutical product: an "organic, humane, bioidentical open-source testosterone" produced from the urine of cows owned by the university. It turns out that testosterone or something like it is quite central to both Voth's quandary and Jack's confessions. But I'll get to that in a bit.

One of the great joys of watching the *something* that develops between Jack and Bess is in observing how each sharpens the dissident sensibilities of the other (this is, incidentally, how a heartbroken Voth describes his relationship with his ex). Bess coaxes, even taunts, Jack out of his deference to the law ("Do you make all your decisions based on the threat of Punishment?"). Jack has an almost magical ability to hear the stories that commodities want to tell. They call out to him, "bawling out their miserable Biographies, their wants, their needs, their Histories and Travels … the entire crowded consecutions of labor, Exchange, and Fraud congealed in them". A Marxist before Marx, Jack aurally pierces the veil of commodity fetishism. We encounter several of the commodities that one might expect to find in imperial London—muslin, indigo, coffee, tea, sugar. But the commodity that is most pivotal to the narrative is a mysterious elixir. Originally concocted by a society of maroons in the Java Sea, the elixir was produced from pig urine through a complex and elaborate process that relied on the collective knowledge of a community now all but destroyed. What is remembered is the delightfully emboldening and bulking effect it had on all who consumed it.

When news of the magical elixir reaches London, everyone can see its enormous potential but has a different reaction to it. Jack wants the elixir, thinking that it might allow him to finally be the cove he knows himself to be. Hearing of Jack's interest and thinking that he could use this to finally ensnare his most elusive opponent, Wild lays an elaborate trap while also devising a grisly scheme to extract the elixir from the gonads of convicted prisoners. Aware that Wild could use his immense profits from the elixir to finance his policing operation in perpetuity, Bess thinks—to Jack's horror—that the only thing to do is to destroy the elixir. This disagreement between Bess and Jack, their most serious in all of the confessions, is almost a metaphor for the great debate in virtually all revolutionary and decolonisation movements: do we want what they have, or do we explode the structure of desire that has us wanting what they want and have? Both/and?

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of our work is the potential revenue it might bring in. *I am a queer Londoner living through a plague while being fucked over by a neoliberal university*.

Jordy Rosenberg[3] has asked a version of this question—or really three questions—in relation to testosterone.[4] First, what dispossessions have turned the natural resource of testosterone into an exchangeable commodity? Rosenberg takes us through the sordid contortions of early modern English penal discourse that justified the use of incarcerated bodies as raw materials for the production of scientific knowledge and the use of labour to transform territory into raw material, ultimately making possible twentieth century testicular experimentation on the incarcerated in the search for virilising remedies (not a million miles away from Wild's gruesome venture). I am reminded that the violence of this dispossession is ongoing by lines from a poem by Janani Balasubramaniam: "My testosterone is made by Israel's largest company. There is colonization running through my bloodstream".[5] Second, noting that testosterone has a tendency to be seen as hypercapacitating the body, Rosenberg asks what guarantee there is that it will always capacitate in ways that contribute to a radical project. Answer, none: molecules in themselves do not do political things. And so, third, Rosenberg locates gendered embodiment in something beyond molecules and, really, beyond the self:

> Remember before the T, and all of it, women who saw you a certain way? How (gendered) embodiment was something you made together? Remember how secret it felt? Can't you take that secret you used to have and let it seed other things? You're really going to have to. Because testosterone wants you to be a War Boy. It wants you to hoard resources and forget where they came from.

This is not an argument for or against taking T (indeed this way of framing the question might be beside the point), but a reminder that the history of the body is not reducible to what is injected into it.

Certainly, this is Jack's experience. Jack is most fully himself, not so much because of the elixir or even his top surgery, but when Bess's quim "pulses hot in the cradle of his mouth", awakening his *something* into life. He is quite literally interpellated by Bess's desire for him as Jack. And yet, this is far from simply the story of two individuals wrapped up in each other. For their desire is also shaped by the historical moment and movements that they inhabit. Somewhere towards the end of his annotating efforts, Voth reaches an astonishing conclusion. Having invested much

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[3] It boggles my mind that I have managed to write a review of this novel (is it a novel?) without naming its author till this late stage. To some extent, this is Rosenberg's doing. By having Jack's confessions brought to us by Voth, Rosenberg cleverly displaces himself from the narrative, even if inviting that inevitable and always annoying question about autobiography. Rather than asking that annoying question, I want to consider here the intertextuality between Rosenberg writing as himself and as Voth.

[4] Jordy Rosenberg, 'Trans/War Boy/Gender: The Primitive Accumulation of T' (*Salvage*, 21 December 2015) <https://salvage.zone/in-print/trans-war-boy-gender/>.

[5] Janani Balasubramaniam, 'Trans/national' (2013) <https://totallytaba.tumblr.com/post/56324814807/the-male-persuasian-transnational-janani>.

labour in demonstrating the authenticity of the Sheppard memoir and been confounded by some of the anachronistic references that populate the text, he wonders if the confessions are an act of plitho-hypomnesis or collective diary-keeping by a multitude that have, in addition, been supplemented by the guerrilla decolonial reading and writing practices of successive generations of radical students.

Anachronism is not only what betrays the truth, such as it is, of the memoir to Voth; it is also something Rosenberg plays with. I can't think of a contemporary writer in English, with the possible exception of Hilary Mantel, who has had early modern characters speak with such fidelity to the argot of their time while also sounding like they were chatting online (When Bess first invites Jack to stay with her, his internal monologue goes into hyperventilating overdrive: "She meant *her rooms*—her rooms with her in them—*Oh God*"; I think I might have read that as OMG or even OMFG). What time are these characters speaking in? Why do they sound so much like us? Or maybe the question is why are we so hungry for them to sound like us?

"BUT NO ONE GETS USED TO LIVING HERE": A RESPONSE TO MAHAJAN, RAO, AND SIRCAR*

*Jordy Rosenberg***

Background Conditions

I want to begin by thanking all the authors and everyone at *Jindal Law and Humanities Review* for their labour on this project. It is humbling that *Confessions* should be the subject of this thoughtful work, especially at this uncanny moment. As all the reviewers note, much of *Confessions* takes place during a lockdown over threats of plague, and details forms of resistance to the policing operations proliferated by the British government during the early eighteenth century in the name of "public health". The immediate context of these events was a 1720 outbreak of Plague in Marseilles, a major trading port for British commerce. Then, in 1721, smallpox spread in London, and the state took the opportunity to expand legislation around surveillance and policing. This weaponizing of pandemic resonates with the politicking of our contemporary moment, and it also, as Mahajan notes, signifies more granularly the quandaries of those of us reading and writing at home, while others are more directly subjected to the leading edge of virulence:

> As I write there are people walking towards home, hoping to cover several hundred kilometres on foot, in the hot May sun, with no food and hardly any water, and no support from the administration. In this case it is unreal to sit and write about rebellions elsewhere and speak of resonance.

I appreciate being able to begin here, with the opening Mahajan makes into naming our complicities with the stratification of health, life chances, and well-being that began far before this pandemic, and has induced a global paroxysm in the

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* Editors' Note: This response is the fourth piece in the four-part book review symposium on *Confessions of the Fox* and follows reviews by Oishik Sircar, Shals Mahajan, and Rahul Rao.

** Jordy Rosenberg is the author of *Confessions of the Fox* (Random House 2018) – a New York Times Editors' Choice selection, shortlisted for the Center for Fiction First Novel Prize, a Lambda Literary Award, a Publishing Triangle Award, the UK Historical Writers Association Debut Crown Award, and longlisted for The Dublin Literary Award. Jordy is a professor of 18th-Century Literature, Gender, and Sexuality Studies and Critical Theory at The University of Massachusetts-Amherst, and is also the author of *Critical Enthusiasm: Capital Accumulation and the Transformation of Religious Passion* (Oxford University Press 2011).

present. Perhaps it is useful to think of this paroxysm in terms of Rao's distinction between the event and the situation of pandemic:

> When I reread *Confessions of the Fox* at the height of the Covid-19 pandemic in London, all the references to plague leapt out at me. In eighteenth-century London, which provides the setting for one of the book's multiple registers, plague is less an event than a background condition structuring relations between the state and its subjects.

Pandemic as "background condition" is another way of gesturing toward a longue durée—the many contingent, accreting determinations that produce the appearance of the punctual. In a sense, the entirety of *Confessions* was an attempt to write a novel, not of an event, but indeed *of* background conditions, specifically the explosion of legislation and surveillance that was unleashed only ostensibly in the name of "public health", and in fact to secure capital accumulation by the ruling classes and to naturalize extreme violence as policing's mandate.[1] Exemplary here was the 1721 update to England's 1710 Quarantine Act. The original Act had mandated that trading vessels from locations suspected of plague be detained in the Thames for forty days before unloading; the update added a provision for the Customs Authority to use force against anyone suspected of contravening the Act. Those who lived, worked, or spent time in the vicinity of the docks—such as South Asian and Southeast Asian sailors press-ganged to service and marooned in London, sex workers, and those persons forced into the category of "vagrant" by the already-existing 1714 Vagrancy Act (which criminalized everything from persons "pretending to be gypsies", "jugglers", and those who could not "give an account of themselves"[2]) became ever more vulnerable to surveillance and punishment, forced into waged labour as the only means of subsistence, or caused to perish.

Vagrancy/Parataxes

As evidenced in the excerpted list of targeted persons above, anti-vagrancy laws were *purposefully* vague; Sal Nicolazzo points out that the "formal structure of vagrancy law, proliferat[ing] potential multitudes instead of homing in on a subject, is central to the construction of "vagrant" as a resolutely open-ended legal category".[3] This open-endedness aims to legitimate policing as itself open-ended and limitless in its power:

> While the broader category of vagrancy implies some measure of conceptual unity, the statute's long, colorful catalogue of disparate types does not propose an essential theory of vagrancy but proliferates the many forms that vagrancy might take while leaving open the possibility that the list could expand to include figures

[1] *See, for example*, Micol Siegel, *Violence Work: State Power and the Limits of Police* (Duke University Press 2018).

[2] Vagrancy Act 1714. Cited in William Hawkins, *Statutes at Large from the Magna Charta to the Seventh Year of King George the Second, Inclusive: In Six Volumes* (John Baskett 1735).

[3] Sal Nicolazzo, 'Lyric Without Subjects and Law Without Persons: Vagrancy, Police Power, and the Lyrical Tales' (2018) 60(2) *Criticism* 149, 164.

> and actions not yet imagined. This effect—one not of hierarchically organized taxonomy but of endlessly proliferating proximities—is produced through the list's parataxis. By evoking the "vagrant" through proliferation rather than the theorization of a particular kind of subject, the parataxis at the heart of vagrancy law grants an equally expansive discretionary power to apprehend figures whose form cannot be known in advance.[4]

Nicolazzo's particular area of interest is the figural arc that extends from the early eighteenth-century Vagrancy Acts through to the Romantic lyric. For Nicolazzo, the vagueness of vagrancy law means that its object—"the vagrant"—is in fact a kind of *anti- or non-object* of thought: unthinkable, unfixable, continually multiplying. At this time, "the vagrant" marks the location of a conceptual aporia—an abjected non-object whose function is to justify the increasing power of policing. What interests Nicolazzo further is how this aporetic non-object becomes the ur-*subject* of Romantic poetry—the wandering, heroic vagrant of Wordsworthian and Coleridgian fame. How, in other words, does the vagrant non-object become the lyric "I", the iconic expressive subject of Romantic poetry? In tracing this genealogy of literary vagrancy, Nicolazzo makes clear that the lyric "I" is haunted by the non-object at its core: the foundational antagonism between private property and its abjected exterior. "Vagrancy", then, represents the historical contingency—and thus the frailty—of property writ large, as well as the revolutionary possibility of its dissolution.

Vagrancy is the site of a volatile juncture that is at the root of racial capitalism and is endlessly reiterated as an insurgent potential that—from the point of view of the state and ruling classes—must be endlessly "managed". It is worth noting that the coronavirus pandemic has now found at its disposal this legacy of anti-vagrancy laws—laws that, in the U.S., took on a specific set of cruel inflections as the Southern Black Codes under Jim Crow. As W.E.B. Du Bois argues, the constitutive vagary of anti-vagrancy laws was the lever that focused and equipped the law to take the broadest possible advantage of the immiserating structural conditions imposed upon African-Americans. Vagrancy Laws, he explains, "were deliberately designed to take advantage of every misfortune of the Negro".[5] The Black Codes extended plantation logic into the period of Reconstruction: "Negroes were liable to a slave trade under the guise of vagrancy. . .laws".[6] For Keeanga Yamahtta-Taylor, these Black Codes are a historical precondition for the contemporary "conflation of Blackness and criminality".[7] For Yamahtta-Taylor, as for DuBois, the constitutive vagueness of vagrancy law is what makes it such a particularly pointed weapon. "After emancipation", she argues, "[b]iologically-inflected ideological explanations, no longer needed to justify enslavement, were deployed instead to justify the surveillance and control of Black

[4] ibid, 165.

[5] W.E.B. Du Bois, *Black Reconstruction* in America (Oxford University Press 2014), 164.

[6] ibid.

[7] Keeanga Yamahtta-Taylor, *From #Black Lives Matter to Black Liberation* (Haymarket Books 2016), 167.

people … Blacks could be arrested for vaguely-worded crimes such as 'vagrancy'". Current fears over the ongoing racist deployment of vagrancy laws and stay-at-home orders to disproportionately surveil, police, punish, and kill African-American people are thus well-founded in a long history.[8] Moreover, the history of literary subjectivity is—if we follow Nicolazzo, DuBois, and Yamahtta-Taylor—bound tightly to this history of vagrancy: which is to say, the figural mediation of the longstanding confrontation of capital and the dispossessed.

Policing Public Health

Another 1721 update to the Quarantine Act was the provision for the authorization of *cordon sanitaires* around presumed areas of plague, and the enforcement of these lockdowns with militias. While London did not have a municipal police force until 1821, in the Quarantine Act's authorization of *cordon sanitaire*, we see a military-state apparatus deployed against its own people in the name of national "health", and in the service of private property and capital interests, even prior to the establishment of the Metropolitan Police. As Travis Chi Wing Lau argues, "the authorization of *cordon sanitaires* meant that 'lines of health' were policed by armed militia, which violently delineated 'healthy' and 'infected' spaces as a strategy to prevent the spread of plague through the trafficking of goods and bodies".[9] And, "despite the very fact that plague itself declined rapidly after the 1665-1666 visitation . . . quarantine legislation only intensified during the early eighteenth century".[10] Though the Plague did not return to England in any great measure during this time, the die of the biopolitical state had been cast.

At the time I was writing *Confessions,* I was interested in connecting this early-modern genealogy of biopolitics—prison experiments, the hierarchization of the right to well-being, the militarization of space in the name of national health—with a twentieth-century reference point: the medicalization of transgender subjectivity and the history of testosterone experimentation, specifically on prison populations. The point, to my mind, was not to claim trans as the ur-subject of medicalized violence, but rather to give novelistic form to a genealogical mandate: that the history of sex and gender require broad conjunctural analyses that are not coincident with the liberal progress narratives often demanded of queer and trans narratives. All this is limned in the novel, so I won't review it here. But it is worth noting that the tragically long history of the forcing of captive and nominally free people into medical experimentation has, nightmarishly enough, found yet another contemporary form, as prisons are currently being considered as potential sites for the testing of coronavirus

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[8] *See, for example,* Anne M. Coughlin and Hunter W. Bezner, 'Will Police Order Stay-home Orders More Harshly Against Black People?' *The Washington Post* (3 June 2020) <https://www.washingtonpost.com/outlook/2020/06/03/stay-home-order-racism/>.

[9] Travis Chi Wing Lau, 'Defoe Before Immunity: A Prophylactic *Journal of the Plague Year*' (2016) 8(1) *Digital Defoe: Studies in Defoe & His Contemporaries* 25.

[10] ibid.

treatments and vaccines.[11] This development should surprise no one. Indeed, perhaps the easiest thing to say is simply that we still live in the long eighteenth century. I, at least, believed this to be true enough that I had hoped that layering a set of historical flashpoints—the medicalization of sexuality, the birth of the British prison system, the contemporary neoliberal university—would effectively estrange the only-seemingly necessary institution of policing by depicting the scene of its birth as simultaneously familiar and unfamiliar. And although the novel tarries in the dungeons of imperial-capitalist strongholds, I hoped it could nonetheless generate a utopian horizon. So, I wished to broadly think through the historical and contemporary intersection of biopolitics, policing, and the representation of sex and gender deviance; but I wished to do so, not in the form of a monograph, but through the practice of thinking that is novel-writing—something the author and critic Samuel Delany, via Nabokov, describes as crafting a "sensuous thought" particular to a specific historical context.[12]

Sensuous Thoughts/Utopian Desire

How sensuous thoughts channel what Fredric Jameson describes as a "utopian urge", differ, broadly speaking, from how strictly scholarly monographs do. One well-worn path of utopianism for literary practice is the disentangling of sensibility from status quo, as in Darko Suvin's Brechtian conception of utopia as a form of "cognitive estrangement". This was not the main approach that I sought out, although *Confessions* does find itself in a lineage of Sheppardiana which includes Brecht's *The Threepenny Opera* (also a retelling of the history of Jack Sheppard); to some extent the novel at times may borrow a Brechtian flatness, unevenly distributing early-modern stylistic properties amongst the different characters. Jack and Bess, for example, are approached in the close third person (and Bess, for one chapter, in the first person), but Jonathan Wild—the Thief-Catcher General—receives a very distant third person frame. It was important to me that Wild be flat, wooden, entirely unrelatable—no back story, no sympathetic trauma, nothing that could produce even the hint of a character arc or *bildung.* In this sense, I think Wild conforms more closely to the kind of characterless character emblematic of the early eighteenth century (perhaps, ironically, his character is structurally more *vagrant* than any of the others), and thus concedes very little to the modern desire to see police characters granted consciousness and relatability. Rather, evacuating that character *of* character was the aim: Wild, to my mind, is a one-dimensional being floating about in a sea of more fleshed-out subjectivities. It may be that this strategy contributes to a defamiliarizing effect, given that the novel's characters inhabit different temporalities, and so conform to different conventions of character. I don't imagine, however, that this technique is a success in the sense of

[11] Matt Pearce, 'VA and Bureau of Prisons are buying Hydroxychloroquine' *Los Angeles Times* (7 April 2020) <https://www.latimes.com/politics/story/2020-04-07/la-na-pol-hydroxychloroquine-prisons>.

[12] Rudi Dornemann and Eric Lorberer, 'A Silent Interview with Samuel R. Delany' 2000 *Rain Taxi* <https://www.raintaxi.com/a-silent-interview-with-samuel-r-delany/>.

producing readerly pleasure. If there is anything utopian at all in this process of defamiliarization, it may be something along the lines of the ascetic, miserable affect Bloch channels in *Heritage of Our Times* in the chapter titled "The Void", which begins simply with a direct acknowledgement of the sheer unsustainability of the present: "But no one gets used to living here".

The utopian urges I more directly sought to draw on have been commented on by all the reviewers. The first of these has to do with what Jameson describes as "[u]topian fantasy mechanisms . . . which eschew individual biography in favor of historical and collective wish fulfillment"[13]; on this topic, Mahajan writes of *Confessions*: "[T]he writing is never singular. The voices speaking keep growing even though only few are introduced to us by name". In Sircar's account, the collective nature of the novel extends to real-life readers, making notations in the margins:

> *Confessions*, as a living artefact, escaped my haptic captivity when I turned over the last page and put it back on the shelf a few months back. Now it sits there with the dog-eared pages carrying copious amounts of my penciled annotations, alongside Dr. Voth's. I only realized while writing this review that by drawing the reader into adding to the "collective diary-keeping", the book's affective trace has made me captive in my own fetishizing of its "partial and fallible" fabrications.

I love the idea of the readers' notes forming part of the novel's paratextual, wish-fulfilment apparatus.

Another utopian urge has to do with what Ruth Levitas describes as the "education of desire",[14] or what Rao captures when he says,

> Against this grim backdrop of surveillance and cruelty, something magical blooms between Jack and Bess, fuelled as much by what they find in each other as by their inhabitation of an undercommons that is called forth by the relentless enclosures of their time and place. . .One of the great joys of watching the *something* that develops between Jack and Bess is in observing how each sharpens the dissident sensibilities of the other.

I suppose I was very much invested in trying to represent the intersection of politicization and falling in love. What the relationship between this and the politicization of readers is (or should be), I'm not sure. The poet and theorist Cam Scott wrote, in his review of *Confessions* in *The Believer,* that the novel is perhaps best understood as "agitprop".[15] I don't feel squeamish about this designation, although I have no idea how successfully I accomplished any of the aims of agitprop. In any case, I do suppose the novel was an attempt at "political art" via the superimposition upon

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[13] Fredric Jameson, *Archaeologies of the Future: The Desire Called Utopia and Other Science Fictions* (Verso 2005), xiii.

[14] Ruth Levitas, 'Educated Hope: Ernst Bloch on Concrete and Abstract Utopia' (1990) 1(2) *Utopian Studies* 13.

[15] Cam Scott, 'Writing Multitudes: The Political Desires of Jordy Rosenberg's Confessions of the Fox' *The Believer* (26 October 2018) <https://believermag.com/logger/writing-multitudes/>.

the ruinous pre-history of the ruinous present of an entirely fictitious—but for that reason, entirely true—story of the past.

The question of readerly additions to the text as a form of collective wish fulfilment carries over to the footnotes as well. Here, I was especially pleased to see Mahajan conjure a fantasized, yet-unwritten footnote, when they write,

> Another point of resonance. An ex and I got in touch and started writing to each other after a painful gap of a couple of years. Very normal queer stuff to do in a pandemic, practically by the book. There must be a footnote about it somewhere in the four-dimensional queer archives of the stretchers on this.

I love the idea of the collective writing process extending to an imagined fourth-dimensional paratext. Along these lines, Sircar's analysis of the difference between the textual effects of an endnote and a footnote interests me very much:

> This [footnote] form demands a reciprocity from the reader where the novel cannot any longer be considered to be at the reader's service. Instead of offering a story that aids the task of reading, the form that *Confessions* takes is where the novel pushes back against comfortable reading conventions that allow us to value different parts of a text hierarchically. In Rosenberg's supple prose, the footnotes militate against how the major story tends to extract surplus value out of the supposed extratextual labour of the story's so-called minor dimensions.

The footnote as resistance to intra-textual exploitation fascinates me, especially because it suggests the footnote as introducing a kind of material presence in the text, a drag on sheer virtuality—or perhaps a kind of resistant praxis. This relates, to my mind, to something I've not worked through to my own satisfaction around the concept of footnote as textual portal. Here, I'm thinking of the sci-fi (or, more properly, what is generally considered to be the "science-fantasy") genre convention of portal literature wherein one passes from a primary (generally more realist) world to another, where magical elements generally reign. In science-fantasy, the portal is most often given phenomenal form—as a door, a closet, window, etc. There are no such doors or windows in *Confessions,* but I have come to think of the footnotes themselves as a kind of portal that, while not visualized thematically within the text, operate to produce a set of temporal and spatial paratexts and proximities nonetheless. I was thinking of something like Junot Diaz's *The Brief and Wondrous Life of Oscar Wao*, or Patrick Chamoiseau's *Texaco* as modelling a kind of science-fantastical universe, where the footnotes are precisely what Sircar describes as non-"adjunct" to the text. This paratextual technique, ideally, threads through, disrupts, and exceeds the diegesis of the main story while still forging diegetic points of contact and connection. I find it interesting, as well, to think about this in terms of what the scholar Treva Ellison has generatively described as the practice of "portalling" as a "disorganization of capitalist time".[16]

[16] Barnard Center for Research on Women, 'Treva Ellison: Black Trans Reproductive Labor'

We could also think of the portal in terms of the experiments in parataxis of Benjamin's arcades projects—his commitment to the mosaic arrangement of the "trash" of history—those by-products of stadial narratives which become available for resignification precisely due to the exhaustion of their own aesthetic value. Portals have a kind of materiality that does not need to necessarily take phenomenal form in order to have (to echo Sircar, above) "haptic" effects. In fact, hapticality, I think, distinguishes the portal to some extent from that other science-fantastical (and science-fictional) trope of *the border*. Or perhaps we can draw a distinction, within the larger umbrella of portal literature, between the utopian-portal as a haptic opening versus the portal-border as inducing dissociative or dis-embodying closures. I think, genre-wise, portals are more the stuff of what Bloch, in describing concrete (as versus abstract) utopias names "organs for the new"—these are portals as embodied and embodying entities and as material practices that may have some relation to the education of desire. While borders, needless to say, are the stuff of horror. The utopian materiality of the portal in Philip Pullman's *His Dark Materials* trilogy would occupy the former camp; the terrifying amnesia-inducing border in Jeff VanderMeer's Southern Reach novels would represent the latter kind of trope—a violent, body-and-memory-robbing, transitional zone.

Relatedly, it is now striking to me to see the conversation around Covid-19 turn to the question of the coronavirus as "portal". In the *Financial Times,* Arundhati Roy writes,

> Historically, pandemics have forced humans to break with the past and imagine their world anew. This one is no different. It is a portal, a gateway between one world and the next. We can choose to walk through it, dragging the carcasses of our prejudice and hatred, our avarice, our data banks and dead ideas, our dead rivers and smoky skies behind us. Or we can walk through lightly, with little luggage, ready to imagine another world. And ready to fight for it.[17]

Echoing Roy—following the birth of widespread rebellion against the Trumpian imperial regime, racial capitalism, and police violence more broadly—and pondering the precipitating events of the police murders of Ahmaud Arbery, Breonna Taylor, George Floyd, Rayshard Brooks, and Elijah McClain, among so many others, the historian Robin D.G. Kelley affirms Roy's model, saying;

> This pandemic *is* a portal, and as a portal it is just an opening. And as an opening, nothing is guaranteed. But it's an opening because it exposed the structure of

<https://www.youtube.com/watch?v=4n1uqggrVPs> accessed on 15 March 2020.

[17] Arundhati Roy, 'The Pandemic is a Portal' *The Financial Times* (3 April 2020) <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca>.

> racial and gendered capitalism and the violence meted up to people who are most vulnerable".[18]

I think it makes sense to end with Kelley's exhortation. Thank you again for reading this novel, and for all your wonderful responses.

[18] Jeremy Scahill, Interview with Robin D.G. Kelly, 'The Rebellion Against Racial Capitalism' (*The Intercepted Podcast*, 24 June 2020) <https://theintercept.com/2020/06/24/the-rebellion-against-racial-capitalism/>.

CONVERSATIONS

The Ministry for the Unconsoled: Margin-Speak from the Jannat Guest House

Arundhati Roy

Seasons of Life and Seasons of Law

Dolly Kikon

THE MINISTRY FOR THE UNCONSOLED: MARGIN-SPEAK FROM THE JANNAT GUEST HOUSE

Arundhati Roy*

in conversation with Dikshit S. Bhagabati, Malini Chidambaram, and Neeta M. Stephen on life and death at the Jannat Guest House from her book The Ministry of Utmost Happiness

Arundhati Roy writes that the pandemic "is a portal, a gateway between one world and the next".** It has forced us to imagine our world anew. Through this set of questions, we explore speculatively how the characters from *The Ministry of Utmost Happiness* are guarding their treasured world from the virus and its attended forms of social violence. Are they imagining a *new world* for their already bold and new sanctuary or still battling the time-honoured clutches of oppression?

The funeral parlour services at the Jannat Guest House[1] *is the collective response of its residents to provide funeral dues to unclaimed bodies. With the Ministry of Health issuing guidelines on Dead Body Management and the Delhi Government creating a Death Audit Committee to account for COVID-deaths, how have the parlour services fared? As the paranoia of contaminated cadavers worsens and, in the words of Giorgio Agamben, our society slides into an abject fear of "nothing but bare life",*[2] *how have the residents inside and outside the Graveyard received these anxieties?*

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* Between *The God of Small Things* (which won the 1997 Booker Prize) and *The Ministry of Utmost Happiness* (2017), Arundhati Roy has authored numerous non-fiction essays, stood for Kashmiri self-determination, protested the devastation cause by mega dams, criticised the US foreign policy in Afghanistan, and has been—and continues to be—an influential human rights and environmental activist. Her non-fiction work has been consolidated by Penguin in a single volume, *My Seditious Heart* (2019).

** Arundhati Roy, 'The Pandemic is a Portal' *The Financial Times* (3 April 2020) <https://www.ft.com/content/10d8f5e8-74eb-11ea-95fe-fcd274e920ca>.

[1] The Jannat Guest House is a major locale of *The Ministry's* plot. This is where almost all the characters live or end up living in the end. The Guest House is built on a small piece of land in a graveyard in Old Delhi, the same place where Anjum's—the protagonist—family is buried. This place at the fringe of life and death becomes a safe refuge for social outcastes and quirky renegades.

[2] Giorgio Agamben, 'Clarifications' (*An Und für Sich*, 17 March 2020) <https://itself.blog/2020/03/17/giorgio-agamben-clarifications/>.

Arundhati Roy (AR): Both the Guest House and the Graveyard are located in the gun-sights of the political and social fallout of the virus. But in their own ways, the three stalwarts, Anjum,[3] Saddam, and Tilo[4] have somehow been forged in fire in terms of their revulsion and retreat from this "New India". In the early days of the lockdown—when the media turned on Muslims, accusing them of "corona jihad" and calling them "human bombs"—tarring a whole community as carriers of disease—even they were deeply and seriously affected by the sheer depth of hatred. They know that that cannot be recalled. That there can be no retreat. That the country they live in will have to sail through this ocean of fire and either be consumed by it, or emerge deeply harmed but ready for radical change. They are more certain than ever that the Graveyard is the best place for them to live in, literally as well as metaphorically. The Jannat funerals still go on because even people who don't have COVID still die. But Anjum and Tilo, being somewhat far-sighted, have started growing food in the Graveyard. It's incredible how much that little patch of land yields. And they have goats, chicken, ducks.

The pavements of Jantar Mantar now bear an uncanny silence. They ask, where is Dr Azad Bharatiya and his fellow protesters? With social distancing norms being enforced through penal provisions such as Section 188 of the Indian Penal Code and Section 3 of the Epidemic Diseases Act, how has Dr Bharatiya continued his decade-long protest?

AR: Jantar Mantar had stopped being that vibrant, anarchic place of protest—the democracy zoo as Dr Azad Bhartiya described it—long before COVID. The Government made an effort to shut it down completely, ostensibly due to "disturbance" to the residents close by. It was then reopened. But the chances of your having to wade through protesters who are even further to the right of the Government are high. Jantar Mantar briefly came to life during the anti CAA/NRC protests. The last time I went there I saw a destitute woman who had made a living space for herself next to the garbage collection point. There was sloganeering going on in the distance—as she sorted through the refuse of previous protests, she repeated the refrains of the slogans to herself … she knew them all. Down! Down! Hai! Hai! Nahin chalegi, nahin chalegi[5]… perhaps she is Ahlam Baji's—the midwife who delivered Anjum—daughter.

Dr Bharatiya has moved for now to the Jannat Guest House. He continues to fast. He continues to understand deeply the terrible fault lines of his country. And like

[3] Born Aftab, Anjum is the protagonist of the book and the founder of the Guest House. She is a Muslim transgender who prefers to go by the term *hijra.*

[4] Tilottama or Tilo is an architecture graduate. During her college days, she became friends with Musa and Biplab Dasgupta. Musa was a top-level terrorist commander in Kashmir, and though is dead now, continues to be Tilo's lover. Biplab, or Garson Hobart, has recently retired as an intelligence officer who served in Kashmir.

[5] Translation: Down! Down! Hai! Hai! Won't work, won't work.

the others in the Guesthouse, in the war of Lovers against Haters, he fights alongside the Lovers.

In an economy that is contingent on the continuance of social distancing measures, how have the residents of the Jannat Guest House and Khwabgah[6] *earned their daily bread? How have Saddam Hussain's*[7] *numerous ventures coped with the economic slowdown?*

AR: It's not easy. But as I said, they're growing food. Zainab continues to make clothes… although sales are down hugely. She's making pretty masks. Saddam sells sanitizers and PPE suits and thermometres. The people who are in very big trouble are those in the Khwabgah. They face an existential crisis. The Coronavirus and a future of "social distancing" are a shot to the heart for them—the chances of things getting better any time soon are remote. Anjum sends money and food—she grows saag, bhindi, beans, tomatoes, chillies, mangoes—and a chicken or two once a week.

The Government is intent on revamping Chandni Chowk and the area around it. What do you think will happen to the Guest House in this refurbished cityscape? As markers of modernity and global tourism inundate this area, will "flying foxes [still] unhinge themselves from the Banyan trees in the old graveyard and drift across the city like smoke"?[8]

AR: Chandni Chowk, Shahjahanabad and every monument big and small, every road sign—everything that does not signal Hindu supremacy, everything that speaks of our complex past—is under threat from this government. The old vultures have exited from the story. The flying foxes will too. So will the Indian Constitution. The Jannat Guesthouse in its physical form will be obliterated. But it will multiply in our minds. It will be our refuge. And the springboard of our stubborn refusal to fade away.

Given the characters' (subaltern) social positions, how do you think their encounters with law and state-power differ from your own brushes with courts?

AR: Their relationship with state power has to do with eluding it. Mine has to do with arguing with it, challenging it. Neither they, nor I have the option of harnessing it—because in our very DNA, for very different reasons maybe, we have been created to oppose it.

[6] A haveli with a blue doorway in Old Delhi, Khwabgah translates as the *House of Dreams* in Urdu. This household of *hijras* or transgender women—a multiplicity of identification reflective of its motley residents—supports itself through dealings with regular customers and by foraging for alms in celebrations across the city.

[7] Saddam Hussain, born Dayachand (also a marker of his Dalit identity), borrows his name from the infamous Iraqi dictator. He works odd jobs—at a mortuary, as a bricklayer, bus conductor, etc.—and lives in the Guest House. His father was falsely implicated by a corrupt police officer in killing a cow, for which he was lynched to death by a frenzied mob.

[8] Arundhati Roy, *The Ministry of Utmost Happiness* (Penguin 2017), 1.

Tilo's time in Kashmir must have taught her a thing or two about lockdowns and curfews. Is there something she can specifically teach the other residents about how to survive this pandemic?

AR: Tilo's time in Kashmir was pre-Aug 5 2019.[9] She has not lived through the crime against humanity, that is a year-long internet and communication siege coupled with a lockdown, curfew, and the densest military deployment in the world. But her time in Kashmir has left her with no illusions about what the Indian State is capable of. Nor about the hypocrisy of its ruling class.

There is a moment in the book when Tilo and Musa lie in each other's arms and listen to Leonard Cohen's Winter Lady. *Has the pandemic revealed the fragility of human intimacy or is this imposed distance a labour of care to ensure that our loved ones keep safe, in anticipation of many more nights of* Winter Lady *once the disease subsides? How has law mediated desire amidst this pandemic: Tilo's desire for Musa, Zainab's desire for Saddam?*

AR: Tilo and Musa are as much frontline soldiers of the myriad variations of love as they are of freedom and dignity. I don't see Tilo and Musa (had he been alive) keeping away from each other because of COVID. Nor Zainab and Saddam. I think they will all be very careful to protect Anjum though. But as I said, the real hit is being taken by those in the Khwabgah and on GB road. Physical intimacy is and will continue to be the greatest collateral of the Coronavirus. More than the law, it will be something that remains embedded in most peoples' psyche. But I think intimacy is also a great and primal necessity for all human beings… they will find a way around it. After all, we take such huge risks when we smoke, when we got to war, when we do adventure sports. We will end up taking those risks when we love too. And that love will involve protest. Mass protests when we march again, shoulder to shoulder. Because to protect what you love you must rage. Look what happened in the US—at the height of Covid. Anger brought thousands onto the streets…

Jannat Guest House appears to be confined in a perpetual state of exception—*a spatial configuration where the violent and oppressive force of law becomes the norm. Has the pandemic amplified this violence on its residents, as we saw with the migrant labourers,*[10] *or*

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[9] On 5 August 2019, the Indian Government abrogated Article 370 and 35A of the Constitution—the provisions guaranteeing autonomy to the region of Kashmir and land rights to its permanent residents, respectively. Following this sudden and hasty move, the state was downgraded to a Union Territory governed from Delhi, its prominent political leaders were detained for months at stretch, and its people were placed under a year-long physical and communicational lockdown.

[10] In March 2020, when India went into a lockdown, thousands of migrant labourers in the cities found themselves unable to travel to their homes. They were stuck without any pay, food, or empathy from the Government and the Supreme Court. People took to the streets, some attempting to walk hundreds of miles to their homes and others just being at the only place where they could. These images of labourers walking homewards, them clashing with the police, and being turned down by the very cities and states that run on their cheap labour, have become a harrowing reminder of India's monumentally mismanaged Coronavirus response.

has it brought the whole world to the fringe of life and death that the Guest House normally survives in?

AR: All the world's a graveyard. The sky has sprung a gigantic leak, oceans are filling up with used masks and PPE suits. On a scale much larger than the used bandages, syringes, and hospital waste in Anjum's graveyard. Human beings' intelligence has outstripped their instinct for survival. Tilottama knew that instinctively, much before she knew of the existence of the Jannat Guest House in Anjum's graveyard, before she became a permanent resident there. Here is a paragraph when we begin to get to know the ways in which her strange mind works.

> Her [Miss Udaya Jebeen's][11] kidnapper, who went by the name S.Tilottama was awake and concentrating. She could hear her hair grow. It sounded like something crumbling. A burnt thing crumbling. Toast. Coal. Moths crisped on a light bulb. She remembered reading somewhere that even after people died, their hair and nails kept growing. Like starlight, traveling through the universe long after the stars themselves had died. Like cities. Fizzy, effervescent, simulating the illusion of life while the planet they had plundered died around them.
>
> She thought of the city at night, of cities at night. Discarded constellations of old stars, fallen out of the sky, re-arranged on earth in patterns and pathways and towers…

Chapter III of the Transgender Persons (Protection of Rights) Act 2019 requires that one make an application to the District Magistrate to be recognized as transgender. One's sexuality has been made contingent on a bureaucratic rationality. Do you think Anjum will ever make this application?

AR: Anjum would not. Saeeda might. But it's hard to know what any of us will do when they turn the screws on us. It's like all of us who didn't want Adhaar cards slowly being illegally coerced into having one. You cannot function without one… all of us are slowly being turned into numbers. All of us are being brought into a surveillance grid. And a grid has co-ordinates. But no magic.

Many of Comrade Revathy's[12] *friends—eminent scholars and activists—are being detained for prolonged periods under the UAPA on the suspicion of being "Maoists" and "Urban Naxals". Had she been alive, how would she have reacted to their arrests—would she have visited Sudha Bharadwaj, Varavara Rao, Anand Teltumbde, GN Saibaba, and others currently languishing in jail?*

[11] Udaya Jebeen is Revathy's (see n 12) daughter, whom she abandons at Jantar Mantar. Tilo adopts her without any proper legal procedure.

[12] Revathy is a Maoist from East Godavari district of Andhra Pradesh, who is raped and tortured by a policeman.

AR: Comrade Revathy is dead. And the prisoners you mention are not allowed visitors. But Revathy's comrades are still in the forest… fighting to keep hope alive in their patch of the woods.

Tilo lived in a slum during her student days. She then lived in a comparatively upscale neighbourhood near Nizamuddin, and briefly in a houseboat in Kashmir. Now she has moved to the liminality in which the Guest House stands. Each space must have its own relationship to the politico-legal apparatus, each location must in varying degrees be shielded from or prone to the violence unleashed through the rule of law. Where does she feel the safest and where the most vulnerable? Which of these spatial configurations is best suited for social distancing?

AR: This is a beautiful question…and I could write a whole book in response to it. But then, in some ways, The Ministry of Utmost Happiness *is* that book. Tilo moves, and she keeps moving, searching for solace. It's when she moves to the Graveyard that she finds it. Here she feels that her body is relaxed enough to accommodate all her organs. In the era of Corona and social distancing—what can be more sane, more comfortable, and more sensible than living in the Jannat Guest House in a room with a friendly tomb and the grandest, most ferocious, and funniest friends that you can possibly have.

It's a very cool place. I live there.

SEASONS OF LIFE AND SEASONS OF LAW: LAW, ANTHROPOLOGY, AND EATING BAMBOOSHOOT AND DOGMEAT

Dolly Kikon*

with photographs by Mhademo Kikon

in conversation with the JLHR Editorial Team on her recent documentary Seasons of Life

We imagine Seasons of Life is much more than just fermented bambooshoot. If "Life" acts as a metaphor for the centrality of this delicacy, then "Seasons" could denote its vicissitudes—the climatic, economic, and social factors affecting the production of bambooshoots. Would we be correct in surmising so?

Dolly Kikon (DK): I chose to name my first film Seasons of Life due to the interconnectedness of human and plant life. It speaks of our dependence on bamboo and how it has sustained livelihoods, cuisines, and culture. Bamboo is integral to Naga village architecture. Bambooshoot is integral to traditional Naga cuisine. My documentary focuses on the lives of women who forage and ferment bambooshoot in in Nagaland. Fermented bambooshoot is a delicacy as well as an everyday staple for many communities across Northeast India. It is an integral part of the food culture there and links the region to its Southeast Asian and East Asian neighbours. In Nagaland and its neighbouring states like Manipur, Assam, Arunachal Pradesh, Tripura, Meghalaya, Sikkim, and Mizoram, bambooshoot is used in various forms: fresh, soaked in brine, and dried. As one of the protagonists in the documentary, Pithunglo, tells us, fermented bambooshoot is a vital spice for many indigenous communities in the Himalayan region. My documentary *Seasons of Life* follows Tsumungi, Pithunglo, and Yanchano, as they labour to forage and ferment tender bambooshoot, a food item cherished across several Himalayan households in South Asia.[1]

How did you insert yourself into the field? There is indeed a great deal to learn from your negotiations with positionality, as someone from Nagaland who now lives in the West—the

* Dolly Kikon is Senior Lecturer at the School of Social and Political Sciences, Melbourne University, and the author of *Living with Oil and Coal: Resource Politics and Militarization in Northeast India* (The University of Washington Press 2019).

[1] For more details, see http://www.dollykikon.com/seasons-of-life/.

academic elsewhere where the geography of South Asia is imagined as a political construct. Where would you like to place yourself behind the visuals of the documentary?

DK: Seasons of Life is an extension on my work in Anthropology of Food, particularly fermented food. Food has always been my passion. While I conducted my ethnographic fieldwork for my doctoral work between 2009-2011 in Assam and Nagaland, I discovered food in variant ways and how they symbolized everyday human relations and evoked memories and sociality. My first attempt to make sense of food was a short essay I wrote titled "Tasty Transgressions: Food and Social Boundaries in the Foothills of Northeast India". The hills and valleys in Northeast India are known for specific and distinct food produce which can be exhibited as an extension of its unique culture. The exchange between the hills and valleys appeals to the senses of taste, sight, and touch.

In relation to the documentary *Seasons of Life*, I wanted to venture out and try a different medium besides text/writing. I have been drawn to various forms, and this was a chance for me to experiment with different kinds of storytelling. Anthropology is a discipline that grounds itself in fieldwork, so I draw deeply from interviews and my engagement in the field. South Asia for me is a region that I engage with. It is not an imagination because violence is not imagined, neither is inequality or caste. In terms of my positionality, I am a feminist anthropologist from the Naga community. I come from the Lotha tribe. I am a Scheduled Tribe in India, a woman of colour, and indigenous outside India. I am not recognized as an Indian in Australia by the Indian diaspora because I don't "look" Indian. I am called a chingchong baby in India. And as I continue to wonder where this chingchong baby country is, all these experiences place me in a good place to speak about caste/race/sexism.

How is ethnographic writing different from the documentary form in terms of textualizing fieldwork? Do videos reveal the presence and agencies of your subjects more unadulteratedly and directly, without the proxy of—say—the writer? As you hint while acknowledging your camera crew and post-production team, does film-making demand a greater degree of collective labour than writing? Finally, do you feel that as a writer you can stake a more legitimate and singular claim to the produced piece than as a film maker who borrows from the contribution of many specialized agents?

DK: I think about forms; storytelling as a form. From there, I deal with structures, and what is distinct between writing and filming is the speed at which we are absorbing the narrative. There is something very powerful about moving images and visuals that demands a mastery over techniques which include the storyboard. I am a Naga and I come from a very strong oral tradition. Since I was a child, the world of orality, story, imagination, and memory were stitched together. I did not grow up with a book full of stories. I grew with a mind full of stories, memorizing my ancestral tales, and then working on a language through which I was able to tell those stories. Without arming myself with the wisdom of my ancestors, who left with me this strong storytelling gift,

I could not do what I am doing today. For example, switching from writing to documentary making, to working with artists to turn my ethnography into theatre performances.[2]

I am writing a book on fermentation, so look out for that! The documentary story is a chapter in the book. So there you go, your imagination of the documentary as a book is indeed a real thing. As a filmmaker, the story rests with me. I take responsibility for the script, managing the team, the budget, and many other things. I directed the shots, selected the location, and realized how much work it takes to make a film. And I am grateful for the amazing team who worked with me.

Seasons of Life celebrates the diversity and flexibility of ethnographic methodologies. It has been an extension of my journey into understanding food cultures. Research work is about and should be about collaboration. Just like the documentary making process, there is an entire labour force involved in doing fieldwork and writing a book/chapter. We do work with several people to make our fieldwork possible, though some researchers hardly acknowledge them. This "local" support is often overlooked as mere "services". Writing and getting our work published is also a collaborative work that involves publishers, reviewers, designers, printers, and many more. Research and writing have always been collaborative.

Before your plunge into academia, you were a practising lawyer at the Gauhati High Court. Did your training as a lawyer help you in breaking into the Western academy or had the routineness of law numbed your anthropological instincts, that is, your "sociological imagination" to put in C. Wright Mills' words? What can legal writing learn from anthropological writing, and is there anything that anthropology can gain from the juridical methods of collecting evidence and constructing narratives in the courtroom?

DK: I stopped being a practising lawyer but I never gave up my engagement with human rights advocacy or reflecting on what constitutes justice and what constitutional rights mean to us. This is central in my first book, *Living with Oil and Coal*, where I engage with constitutional guarantees and also extra-constitutional relegations like the Armed Forces Special Powers Act (1958). The routineness of law is a fascinating subject, and in Anthropology it is the everydayness of these legal experiences that allow us to examine how violence and inequality become mundane and normal.

My legal training allows me to be fascinated with issues of ethics, boundaries, values, and how we try to instil law and order. My training in anthropology allows me to connect with a larger world out there; from the plant world (understanding colonization through laws and regulations on plants), to the animal (prohibitions, animal rights, and conservation) and the spirit world (occult and witchcraft). These

[2] To engage with my non-writing projects, check out, www.dollykikon.com/projects.

"Our ancestors foraged for Bambooshoot. They traded Bambooshoot and fed it to us too...This is how we were brought up"

A FILM BY
DOLLY KIKON

SEASONS OF LIFE

FORAGING AND FERMENTING BAMBOOSHOOT DURING CEASEFIRE

PRODUCED AND DIRECTED BY DOLLY KIKON
CINEMATOGRAPHY P. MENANGNICHET AND MHADEMO KIKON
EDITING HIRAK JYOTI PATHAK
SOUND TRIHANGKU LAHKAR
MUSIC REN MERRY

trainings in my life have prepared me for a fun-packed career in research and engagement. Please do let me add that I graduated with History honours as an undergraduate student. So there you have it. I am armed with a historical-legal-ethnographic training which forces me to pay close attention to the world around us. For example, it is these combined trainings that allow me to write about things such as the social life of vernacular human rights culture like my essay, "Terrifying Picnics, Vernacular Human Rights, Cosmos Flowers".[3] Witnessing everyday experiences of human rights activities in Northeast India has also helped me to understand the importance of engaging with human rights and justice in militarized societies in India and beyond. Human rights are not assured only in the annals of law or the courtrooms. The prevalence of Armed Forces Special Powers Act[4] for more than half a century means that what is law/justice/rights is often different for the state agencies and the community on the ground.

Women seem to feature predominantly in the bambooshoot enterprise. However, sociological insights of late have assailed the romanticized notions of gender-egalitarianism in the matrilineal societies of the Northeast. We have come to realize that when contested by globalization and incursions from mainstream India, indigenous matriliny gets circumscribed by severely subordinating forms of patriarchy. Has the production of bambooshoot followed a similar trajectory? How have globalisation and tourism interacted with this industry, and how has this played out on the register of gender?

DK: The notions of gender justice in Northeast India are indeed romanticized and a far cry from reality. Except a handful, indigenous tribes are predominantly patriarchal to the core. Even for tribes that are matrilineal, a little probe would reveal how men still hold access to and control of property. The misconception of a gender egalitarian society amongst the Northeast communities is perpetuated from within as well as without.

A majority of the state legislatures in the region do not have even a single woman MLA. The women's reservation protests in Nagaland in 2017 furthered the patriarchal agenda to preserve power and decision-making authority for men only. In 2017, I remember furiously writing,

> Like many nationalist societies around the world, the issue of gender justice and rights have remained marginalised for a long time… Naga male bodies have acquired the language of justice to retain the order of Naga male heritage and patrimony.[5]

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[3] Dolly Kikon, 'Terrifying Picnics, Vernacular Human Rights, Cosmos Flowers: Ethnography about Militarized Cultures in Northeast India' (2017) 1(1) *E-Journal of the Indian Sociological Society* 48.

[4] *See* Dolly Kikon, 'The Predicament of Justice: Fifty Years of Armed Forces Special Powers Act in India' (2009) 17(3) *Contemporary South Asia* 271.

[5] Dolly Kikon, 'Gender Justice in Naga Society – Naga Feminist Reflections' (*Raiot*, 22 February 2017) <https://www.raiot.in/gender-justice-in-naga-society-naga-feminist-reflections/>.

In the last three years, little has changed since then. We have not made any progress in any of the states in regard to the constitutional guarantee of women's reservation. We deny women political power under the guise of protections of customary law.

Globalization and market economy extrapolate gender-based violence as well as other challenges. The three women in my documentary—Tsumungi, Pithunglo, and Yanchano—all support their household incomes. They literally run their families with little or no support from outside. Foraging, fermenting, and selling bamboo shoots have become women-driven enterprises. However, these processes are all self-driven without government assistance for storage, market linkages, transport and sale. None of the three women I interviewed benefited from any of these.

Since we have raked up culinary sensibilities, we cannot help talking about two relatively recent films: Amis *and* Axone. Amis *is an Assamese film which chronicles the burgeoning relationship between a doctoral student in gastronomic anthropology and a married paediatrician. The foreclosed desire of sexual gratification in their illicit relationship vents out as lust for forbidden meats. They begin with country chicken and then venture into more stigmatized foods like beetles and bats, until the structure of desire turns against their own bodies and they cannibalistically start eating each other. In a sense, this is a film about subverting the taboos about desire and culinary preferences—especially those foisted repressively.* Axone*, on the other hand, is mostly catered to the outsider's gaze; the film is less about what people in the Northeast eat than what others think of Northeasterners' food habits. Tell us something more about the imperialistic politics of food.*

DK: *Aamis* and *Axone* are two different films for me. Food is as real as it gets in our lives. Ask a Dalit or a tribal from Nagaland whether food is a metaphor and they will laugh at us. For tribal people and Dalits, their humiliation and the violence are often about what they eat. Or ask a Muslim whether beef is a metaphor, it surely is not. Coming to your question about what constitutes food, not food, forbidden food etc. are categories laid down by human beings themselves. While the boundaries of food and desire is explored in *Aamis* (an excellent film which I really enjoyed watching), racism and the migration experience is showcased in *Axone*.

My own work on food from my essay "Fermenting Modernity: Putting Akhuni on the Nation's Table in India"[6] to "Tasty Transgressions"[7] and "Making Pickles during Ceasefire"[8] showcase how we are keenly aware about the importance of food in our lives. Food is deeply political, and as much as we disguise it with terms

[6] Dolly Kikon, 'Fermenting Modernity: Putting *Akhuni* on the Nation's Table in India' (2015) 38(2) South Asia: Journal of South Asian Studies 320.

[7] Dolly Kikon, 'Tasty Transgressions: Food and Social Boundaries in the Foothills of Northeast India' (2013) 54 Anthropology *News* 15.

[8] Dolly Kikon, 'Making Pickles During a Ceasefire' (2015) 50(9) Economic and Political Weekly 74.

like taboo/stigma/prohibition/ban/transgression, the more apparent it becomes how dominant communities and groups dictate what certain groups can/cannot eat. Food is so political in India that the increasing criminalization of certain food practices on the basis of religion, morality, compassion, or based on civilizational ground needs to be interrogated.

Recently, Nagaland banned the sale of dog-meat. Do you see this as another incident of legally legitimating the stigmatization of certain culinary choices—especially amidst the prevalent volatility of beef nationalism in India—or is this interdiction borne out of genuine animal-rights concerns?

DK: This is an excellent question. Everyday practices of food shaming and humiliation in India is rooted in a caste logic. So, engaging with food cultures in India also means reflecting on the prevailing casteism and racism in the country. What defines what is safe or hygienic? Paneer or akhuni? Dog meat or chicken? Is beef or pork inedible because it is sacred/taboo for particular religious groups? So, as I write in my recent essay "The politics of dog meat ban in Nagaland",[9] everyday food choices reveal broader issues of caste violence and nationalism in India. This is a topic I have earlier dealt with too.[10] For me, the issue of animal rights and care in India is entangled with caste and class politics. Unlike the beef issue, the dog meat is about the civilizational and savagery discourse. That is the reason why the Food Safety and Standards Authority of India (FSSAI) Regulation, 2011 has been invoked to note how dog meat is not safe for human consumption. This is not the case with cow meat.

Perhaps this is good note to end. When we say that JLHR will serve as a platform for voices from South Asia, we are aware of the historical silences that we must reckon with. The Northeast continues to remain absent from the legal discourse of India. For instance, our imagination of legal pluralism stretches only to religious and customary laws but not tribal laws. I doubt if any top law-school in the country teaches a course on indigenous jurisprudence or tribal laws. As someone who has seen both the bar and academy, how can modest student-led ventures like ours aspire to make sustainable and long-lasting changes in our bureaucratized institutions? Is legal anthropology a way to illuminate what law has chosen to ignore or will it trap indigenous juridico-legal cosmologies in the persistent divide between core-law subjects that constitute the inside and the interdisciplinary soft-law fields that cluster the outside?

DK: Congratulations on this initiative. The fact that you are aware of the existing challenges both in terms of legal pluralism and the dominant discourse in India shows

[9] Dolly Kikon, 'The Politics of Dog Meat Ban in Nagaland' (*Frontline*, 14 August 2020) <https://frontline.thehindu.com/the-nation/the-politics-of-dog-meat-ban-in-nagaland/article32082833.ece>.

[10] Dolly Kikon, 'Barking up the Wrong Tree: Why the Debate on Eating Dog Meat in India (and Globally) is Hypocritical' (*Scroll.in*, 3 September 2017) < https://scroll.in/article/849123/barking-up-the-wrong-tree-why-the-debate-on-eating-dog-meat-in-india-and-globally-is-hypocritical>.

the integrity of this project. The questions you raise about disciplinary boundaries of law as profession, anthropology, and jurisprudence stem from how knowledge and practice are framed in our lives. Human beings shape what ought to be considered as intellectual and rational knowledge, or what is justice and rights. All practices and disciplines tend to obscure language (what is known as high theory) to maintain and reiterate power. If we are unable to break the boundaries of disciplines and reach out in solidarity as anthropologists, poets, lawyers, jurists, and indigenous elders, what good is all these texts, arguments, high theory? We are wasting our time because we only validify subjugation and inequality.

PANDEMIC DIARY

Pandemic Diary in Three Parts

Vasuki Nesiah

Where the Pandemic has Led Us

Teesta Setalvad

PANDEMIC DIARY IN THREE PARTS: FIELD NOTES FROM NEW YORK CITY*

*Vasuki Nesiah***

Part I: March-April 2020, Crisis Temporalities

It had been the winter of our discontent, but discontent that was expressed collectively in public protests – Hong Kong, Beirut, Santiago, Cairo, Delhi, Paris, and many other places all over the world. In New York too, we had rallied against Trump, canvassed for Bernie, and participated in protests led by a new generation of activists forging community through solidarity and dissent. Against this backdrop, when pandemic emergencies were declared, and lockdown rules and curfews forced retreat into our private domains, the isolation felt all the more challenging.

I was teaching two international law classes in the Spring semester – one was *Human Rights, Human Wrongs,* and the other *International Law, Racial Capitalism and the Black Atlantic.* As the human rights class moved through the semester, we discussed how some dominant branches of the human rights field had moved, post-cold war, towards closer affinities and institutional alliances with international humanitarian law and international criminal law. We examined how this turn entailed an amplified focus on atrocities that were catastrophic in scale such as war crimes and genocide, and institutions such as the International Criminal Court and the Security Council. We analysed how the companion to this amplified focus was a pronounced neglect of routine atrocities, the quotidian "slow violence" embedded into the international order, and, concomitantly, an increased disconnect from the social movements challenging that dominant order. In this way, the class worked through a taxonomy of critical moves interrogating the political life of crisis and catastrophe in international law – examining/ illuminating the genealogies of particular constructions of crisis, exposing

* These pandemic diary notes engage with "To be in a Time of War" from Etal Adnan's *In the Heart of Another Country* (2005), "Thesis IX" of Walter Benjamin's *Thesis on the Philosophy of History* (1940) and Amna Akbar's "The Left is Remaking the World" in *New York Times* (11 July 2020).

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our routine as catastrophic, unpacking the distributive impacts of large scale atrocity, analysing how a focus on one crisis can obscure another, and so on. In turn, in the international legal history and racial capitalism class, we often grappled with the ways in which international legal historians had turned away from their discipline's own constitutive imbrications with the catastrophic histories of slavery and colonialism. In response, those making the international law arguments for reparations for slavery and colonialism, often directed their projects towards yoking the experience of slow violence with the history of catastrophic atrocity.

These preoccupations were part of what my students and I took with us into lockdown as NYU closed indefinitely mid-March, and we prepared to continue the rest of the semester online. When COVID 19 swept through the world and landed in New York City, its path also began unravelling the distinction between quotidian violence and catastrophic violence. NYC passed laws declaring an emergency as pop-up hospitals were set-up in central park, the Navy's medical ships sailed into Pier 90 on the Hudson river, and make-shift morgues emerged on sidewalks outside nursing homes; for the first time since World War II, the city declared a curfew; NYU and Columbia dorms were evacuated to house medical personnel; there were rumours that our classrooms would be temporarily ceded to the city to transform into ventilator factories. There was wide recognition that we were confronting a health crisis that was catastrophic in scale. However, the catastrophe was also deeply shaped by, and impacted, the micro, quotidian aspects of NYC life. The barren streets had an immediate economic impact on everyone, from the gyro and falafel selling street vendors to every corner bodega worker. The most economically and racially marginalized communities in the city were hardest hit by COVID, as routine health and wealth inequalities rendered those communities most vulnerable to the ravages of the virus. The virus was not man-made, but the shape and shadow of its impacts could not be disentangled from the world we had made.

Even quarantining at home, we could sense crisis in the air as ambulance sirens provided the 24/7 soundtrack to the city in lockdown. The sense of catastrophe had a double temporality – both present all around us, but also hovering over our future as the catastrophe that was going to come upon us as we waited. We waited as if suspended from our regular lives; we waited devouring the news and feeling the frenzy of the virus on the horizon, as that endless waiting gradually became our regular life. We waited sometimes bored, sometimes overwhelmed. We waited while resenting the forced isolation of working from home, while feeling guilty about the luxury of being able to work from home when so many had lost their jobs, and so many others had to go to work in person amidst all the risk.

As time spent in lockdown became both compressed and infinite, I returned again and again to the company of Etal Adnan's prose-poem "To be in a Time of War". It was like meeting an old friend over coffee and realizing that with her Benjaminian sensibility she could guide you through this time of catastrophe, giving

voice to feelings you could barely articulate about what this interminable waiting felt like, these new routines of isolation and trepidation, the intimacies of global crisis that were, at once, far away and ever present. Adnan writes "To be in a Time of War" in 2003 in Beirut, listening to the radio with dread, knowing that news of the bombing of Baghdad is imminent. By the end of poem, she finds herself in New York City, walking to the Hudson river to see the sun go down as she meditates on the relationship between time and place. Seventeen years later, as we all wrestle with the temporalities of lockdown, she speaks with acuity to the affective rhythms of staying in place, waiting for something to happen with this invisible virus and a new global war with new geographies of victims.

> To say nothing, do nothing, mark time, to bend, to straighten up,
> to blame oneself, to stand, to go toward the window,
> to change one's mind in the process, to return to one's chair, to
> stand again, to go to the bathroom, to close the door, to then open
> the door, to go to the kitchen, to not eat nor drink, to return to
> the table, to be bored, to take a few steps on the
> rug…
> To look at the watch, the clock, the alarm clock, to listen to
> the ticking, to think about it to look again, to go to the tap, to
> open the refrigerator, to close it, to open the door, to feel the
> cold, to close the door, to feel hungry, to wait…
> …To consider the present time as sheer lead.

Each day, each moment, each thought, flows into each other without our habituated breaks, while also interrupting each other in ways that produce a constant sense of dislocation. We wait with a leaden stillness as the clocks tick; we also wait impatient and hungry with manic energy. We are in a crisis but times move slowly; each minute weighted with ominous dread, we wait.

Part II: May-June 2020, Policing in Crisis

George Floyd (October 14, 1973 – May 25, 2020) – Cause of death: mechanical asphyxiation. (Autopsy report of Dr. Allecia Wilson, pathologist).

> To rise early, to hurry down to the driveway, to look for the paper, take it out from its yellow bag, to read on the front-page WAR, to notice that WAR takes half a page, to feel a shiver down the spine, to tell that that's it, to know that they dared, that they jumped the line, to read that Baghdad is being bombed, to envision a rain of fire, to hear the noise, to be heart-broken, to stare at the trees, to go up slowly while reading, to come back to the front-page, read WAR again, to look at the word as if it were a spider, to feel paralyzed, to look for help within oneself, to know helplessness, to pick up the phone, to give up, to get dressed, to look through the windows, to suffer from the day's beauty…

George Floyd (October 14, 1973 – May 25, 2020). Cause of death: racial capitalism – the routines of racial capitalism and the catastrophe of racial capitalism. There is a web of connections behind that moment, 8:18 pm on the 25th of May in the year 2020,

when Derek Chauvin pressed his knee on George Floyd's neck. Ruthie Gilmore points out that the young store clerk who called the cops, suspecting George Floyd of a counterfeit $20 bill, was essentially deputized by the police. Not personally and directly deputized but deputized in ways that she experienced as a personal responsibility – "doing her job to keep her job". In America, this is a war that targets Black people but enlists everyone – a shop clerk alert to the possibility of petty theft; teachers dealing with a student deemed disruptive; a neighbour worried about public safety; pedestrians encountering the homeless on a park bench; a commuter seeing a person with mental health issues on the subway; a bartender with a drunk customer. They all routinely call the police as if this was not a catastrophic war.

> …To wait. To think about the war. To glance at the watch. To put on the news. To listen to the poison distilled by the military correspondents.
> To get a headache. To eat dry biscuits. To put the radio back on. To hear bombs falling on Baghdad. To listen to ambulances. To go out on the deck. To look at the lengthening shadows on the grass. To count a few dead flies on the pane. To go to the table and look at the mail. To feel discouraged. To drink some water. To not understand the wind.

George Floyd. Ahmaud Arbery. Brionna Taylor. Eric Garner. Sandra Bland. Trayvon Martin. Michael Brown. Tanisha Anderson … and many more as both compressed and infinite testimonies to the long reach of slavery and settler colonialism on the streets of Minnesota and Georgia, Kentucky and New York, Illinois and Florida, Missouri and Ohio. Continuity and repetition; the endless repetition of the denouement to routine shopping while Black, driving while Black, walking while Black, sleeping while Black, dancing while Black, exercising while Black … law's imbrication with slavery and settler colonialism, that "catastrophe that keeps piling wreckage", should not just be a history course, but a course about the present moment created by the stormy winds "blowing in from Paradise" on that tortured path from the Black Atlantic, through Jim Crow, to the intersection of East 38th Street and Chicago Avenue in Minneapolis where George Floyd was killed. The sense that we are trapped in a country named "progress" where these killings are never ending, trapped in a country where exposing each routine atrocity has not halted their catastrophic recurrence. Benjamin tried to warn us about the promise of progress; this sense of no alternative future feels suffocating. Mechanical asphyxiation – when the dead cannot be awakened and what has been smashed cannot be made whole.

Ever since NYU shut down on March 11th, we have been checking-in on each other in our Zoom classrooms – going around individually to see how everyone and their loved ones are faring as COVID sweeps through the city. The differences in how each of us is situated is more starkly visible – one student has lost multiple family members; for another, the twin terrors of COVID and police brutality remains abstract as news and numbers that indict the system: NYC has as much as 800 COVID deaths a day at its peak; with 24,000 total deaths – 8 times the number who died in the city during the world trade center attacks. More numbers: over 20 times George Floyd says

"I can't breathe" in the 8 minutes and 46 seconds when Derek Chauvin had his knee on his neck.

International law gets airtime in news briefings as if called forth by our human rights seminar – activists and UN agencies invoke the right to life and the right to health; the right to assemble and the right to protest. The Human Rights Council passes a resolution. Earlier in the semester, the class had discussed the International Convention against All Forms of Racial Discrimination and the conversations about reparations for slavery and colonialism in Durban and elsewhere that are part of its afterlife and backstory. If only we had more international law and more adherence to the law, some argue – more policing of the police. We make connections with Kashmir and Palestine – powerful states and vulnerable communities; the harshest policing has always been reserved for those closest, even as bombs and drones travel further afield. Other students probed political visions not tethered to legalism. Two students are planning to spend their summers working with abolition organizations that have emerged from social movements challenging the prison industrial complex. More questions: Can we imagine transformative justice alternatives at the scale of international law – or are these paths that need to be built on the ties that bind local communities and the trust and solidarity forged over time and relationships? We linger with the connections between the local and global – including the critique of the carceral turn domestically, and the turn to criminal law internationally. Are liberal legalism and white supremacy intertwined in a world where liberalism and empire came together not in embarrassment but in mutual tribute? How do we connect the dots between America policing its city streets in the name of public safety, and the bombs it rained on Baghdad and elsewhere in the name of human rights?

> To run down for the Sunday paper. To read: "Target: Baghdad." Back to the radio, hear about the American dissidents. Hear that the Blacks are overwhelmingly against the war, that the Iraqis are resisting. Do some cleaning. To put up with an inner rage.

The class had discussed the ways in which the routines of war are interconnected, the parallels between the war on crime and the war on terror; how the genealogies of different registers of lawfare and warfare have shared ancestry and the language of war prefigures the weaponry. The rhythm and meter of the necropolitical logics that render black lives precarious in one battlefield echo the demographics of the precarity of Muslim lives in others. Like the spaces that Adnan narrates, we too feel that the intimate and the global are intertwined not only in how the world is structured but in how we experience the world, breathing with difficulty as dusk falls and shadows climb.

> To sneak through the hours. To fall into prostration. To get lost in questioning. To close all avenues. To let dusk fall or, rather, shadows climb. To lite the lamps. To avoid the news. To wash one's hands. To dry them carefully. To shake one's head and everything inside it. To breathe with difficulty....

> To reach a state of parallel awareness. To go to the window just to make sure that it's very sad outside, like in Baghdad, under the bombs.

Part III: July-August 2020, Unsettling the Future of Crisis

> To turn the page without moving into a new life. To put on the radio. To listen and receive much poison on one's face. To curse the hour, the fire, the deluge and hell. To lose patience. To lynch misfortune. To prevent the trajectory of inner defeat from reaching the centre. To resist. To stand up. To raise the volume. To learn that the marches against the war are growing in number.

From the isolation of lockdown in our individual homes two months earlier, we moved to find community in protests – once again following the lead of young activists who are pursuing (in the words used by some) "non-reformist reform". From a sense that we were unmoored in time, our presents are now structured and grounded by the times and places of marches, demonstrations and vigils. New compasses guide our movements, and more and more people are able to reach out and grasp onto (what Amna Akbar describes as) "practical ladders to radical visions."

We never know, a friend says, if any given moment is doom or dawn. Even as we protest, we carry (already old) anxieties about COVID, alongside new anxieties about tear gas and arrests, deportations and travel restrictions. But overriding all that is our rage about George Floyd, and all who came before him and after him who had difficulty breathing – but then, even as we collectively curse 8:18 p.m., on the 25th of May, 2020, there is also the exhilaration of solidarity with strangers when received conceits and inherited monuments are rethought and torn down the world over.

The coordinates of international law, and even the lines we drew in our battles with it, have been scrambled; the histories and futures of those battles are being rewritten as we speak, settling and unsettling the way memory and futurity are stitched together in different narratives of international law and the crisis of colonialism, slavery, and their afterlives. The idea of abolition was once so far-away it was unthinkable; today, with its heart beating at a compressed and infinite rate, this idea has become thinkable.

> To hear a war from far-away. For others; to bomb, eliminate a country, blow-up a civilization, destroy the living. To exit from one idea to enter another.

The semester is over and the collective spaces of Zoom conversations with students are on hold till we re-open for the fall; by then we may have a world that has upended itself yet again. It is still just the early days of July in this moment that we are sometimes tempted to call a time of progress.

WHERE THE PANDEMIC HAS LED US

*Teesta Setalvad**

It was in a strange way that the COVID-19 pandemic and lockdown hit India and Indians. I still recall the dates, March 17, 2020: for personal reasons entirely, I had to cancel a trip to Delhi. My travel schedule is hectic and once or twice a week forays by train, air or road are regular to my life routine. On the road, I write as I move, jotting down thoughts on pieces of paper, tracking developments with our fantastic grassroot teams in Gujarat, Sonbhadra, and Assam. Exhausting but normal.[1]

The weeks and months preceding the lockdown were exhilarating as the streets of India and Mumbai, and even the *kasbahs* of small-town India, were reverberating with a citizens' protest of the kind we had not witnessed in a long time. Who was to think that within months—six months—of a majoritarian regime being voted in, in May 2019, for the second time, it would stand seriously shaken? That too by protests from a section of citizens it had done everything, really and otherwise, to demonize? Indian Muslims! Jamia, JNU, Shaheen Bagh, Pune, Mumbai, Allahabad, Kolkata, even Gujarat, interiors of Maharashtra, Bihar, and Uttar Pradesh, protesters poured out, in open defiance of a law—the Citizenship Amendment Act (CAA) 2019[2] that posed a serious existentialist threat to Muslims in India. The CAA was brought in along with the threat of an all-India National Register of Citizens (NRC) and a National Population Register (NPR) (in that chronology). It was politically aimed at isolating Muslims, even though Assam's experience[3] had shown us at Citizens for Justice and Peace (CJP)—and everyone else willing to see—that once an unconstitutional threat of documentary citizenship was employed,[4] large sections of Indians would stand disempowered, a corrupt bureaucracy would rule the day, and the society would stand seminally fractured and divided on sectarian lines.

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[1] See *Citizens for Justice and* Peace <cjp.org.in>.

[2] 'How Dangerous is the CAA + NRC?' (*YouTube*, 2 January 2002) <https://www.youtube.com/watch?v=bjGIT5jfoEY>.

[3] 'Empowering Assam: CJP Conducts Paralegal Training Workshop' (YouTube, 26 August 2019) <https://www.youtube.com/watch?v=oF2mU9nP4bw>.

[4] 'Behind Shadows: Tales of Injustice from Assam's Detention Camps' (*YouTube*, 27 August 2019) <https://www.youtube.com/watch?v=z5UeVs6hURM&t=81s>.

Back to March 17 when I could not travel to Delhi; within days, Maharashtra took the decision to curtail office-going traffic. By the weekend and next week, the lockdown was in place. Did we have time to absorb the implications?

Mumbai is vast, complex, overcrowded, and disparate. We are based here, our team at CJP and Sabrang located here. Whispers of food shortage led the more privileged of us to stock up, but before we could even begin to experience what impact this lockdown would have on our *bastis* and high-rises, panic calls for rations started pouring in. In 2005,[5] when in the month of July we had been hit by a terrible flood, we suspended all our other law-and-justice work and joined hundreds of others in providing relief. That then was what the end of March, April, May, and June meant for us. Providing ration relief; buying, packaging, reaching, delivering. This time the work was more taxing and tense: our team was risking itself moving out, buying bulk rations; we were all taking risks packaging and delivering monthly kits. It had to be done.

The first time I realized the value of a mobile during conflict was on February 27, 2002. I had acquired my first Nokia mobile in the September of 2001 and it was an expensive business, Rs. 22 per minute. As news of the ghastly Godhra train burning came in, within minutes my phone was ringing with distress calls from over twenty of Gujarat's thirty-three districts.[6] My mobile record reflected the distress on the ground: local police were not responding as attacks with systemic precision were organized and amplified.

Switch to 2020. The smartphone and India's migrant workers. CJP was working with partner organizations in Bengal, Orissa, UP, and Mumbai to provide relief where it was really needed. Each day, calls would come in, and we would frantically tabulate, cross check, access food and deliver. There was always the question of raising resources. Yet, the CJP community proudly delivered. We managed through this mammoth collective effort to reach 55,000 families all over Greater Mumbai.

We built an understanding of how the migrant worker lives and made lasting connections. And we also resolved to ensure a lasting relationship.[7] We began the Migrant Diaries Conversations:

> Our Migrant Diaries series brings you these wonderful Indians who use the smartphone, celebrate, mourn but stoically, navigate a difficult life trajectory simply because the Indian Constitutional Dream—Articles 13, 14, 15, 16, 17, 19, 41, 41A, 43—have just not been realised. A real India will only be born or seen or

[5] 'Hand in Hand: Saluting the Unsung Heroes of the 2005 Deluge' *Communalism Combat* (August-September 2005)
< https://www.sabrang.com/cc/archive/2005/sep05/cover.html>.

[6] Teesta Setalvad, *Foot Soldier of the Constitution: A Memoir* (Leftworld Books 2017).

[7] Teesta Setalvad, 'A Call to Our Conscience' (*CJP*, 8 June 2020) <https://cjp.org.in/a-call-to-our-conscience/>.

> heard when the vast sections of us, not just the twitterati, the middle classes or the entitled, get representation, power and a voice to decide policy, to make choices, to guide the country forward.
>
> Bets are that these people, our Tinku Shaikh, Hurdanand Behra, Dilip Rana, Ganesh Yadav, Pradeep Mal, Lipton Shaikh, Rocky Ali, would all opt for environmentally friendly solutions and lifestyles! Bets are they would believe in a culture of "share and care" and not "consume and acquire". Romantic as that may sound, it can and will happen. If the vision of the policy representation comes from a position of real understanding of denials and discrimination (remember our own Phule, Ambedkar, Kabir?), solutions will also be more real and more effective, impactful, and compassionate.
>
> Will the Covid 19 pandemic lockdown and its utterly cynical implementation that harrowed and uprooted millions, lead to this kind of seminal change? Where our social discourse speaks of the solutions while not whittling down the problems, where our political agenda is set by this huge upheaval and displacement, where subsequent policies and laws are made and (those unjust) are unmade in response to what these 56 crore, or 34 crore, Indians actually need and want.[8]

So the conversations were recorded. With Tinku Shaikh, Ganesh Yadav, Hrudanand Behra, Dilip Rana, Rocket Ali. The names are as fascinating as the persons we got to know and love.

> "63 of us travelled four days and four nights in an open six-wheeler truck," says Tinku Sheikh, describing the journey he and his friends undertook from Kapurbawdi in Thane, Maharashtra to Rampurhat in Birbhum, West Bengal. "In the truck we took turns to stand and sit during the day. At night sometimes we had to pile up on each other in order to sleep. Our bags hung above us, on a rope line that we suspended across the truck," said Sheikh describing how they all managed to fit into the small space.
>
> 27-year-old Sheikh has a young wife and a 4-year-old girl back home. His parents also live in Bengal. "If not for *obhab* (want), why would we leave our parent's house and the comfort of our birthplace," he asks. "We never owned a significant amount of land. Whatever little we had was divided between my father's three brothers," he explains.[9]

What now? Will urban India choose again to slumber and forget? The mass exodus was called shameful, shocking, and worse and more than what India had encountered during Partition. What will be the lessons that will stay and we will learn?

Not used to pontificating about others, lets speak about both myself and CJP. My closest friends and lawyers fought valiantly for rights of migrants in courts. The courts were slow and distant, distinctly a failure. We all fumed.

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[8] ibid.

[9] 'Migrant Diaries: Tinku Sheikh' (*CJP*, 8 June 2020) <https://cjp.org.in/migrant-diaries-tinku-sheikh/>.

What could be a lasting engagement, I asked? In between the enchanting phone calls from Hrudanand, Tinku, Boshir, Lipton and Rockly—all sending us lovely "thank you, miss you pics and videos"—I wondered how we could make some meaningful contribution towards ending this existentialist exclusion: fellowships among the migrant workers, hunting for sustainable solutions, was one that we have launched.

But there was something more fundamental. An idea grew and sprung within me suddenly. It has now become a core campaign for us. Why should India's migrant-worker population not have the right to vote?[10]

> India's gaze has, for the first time, been turned towards the "migrant labourer". For Indian democracy to learn the right lessons from the plight that a sudden lockdown has caused this vast section of Indians, a condition that has been brought before the more settled and privileged sections, including politicians, one crucial element must surely be to secure to them the right and facility to vote.
>
> Migrant labourers mostly hail from most poverty-driven rural areas and from among the most marginalised sections (SC/STs and OBCs, and other minorities, including Muslims). They are mostly uneducated, and lack assets including land. As of 2011, Uttar Pradesh and Bihar were the largest source of inter-state migrants, with 83 lakh and 63 lakh migrants respectively.
>
> Most migrant voters have voter cards for their home constituency. A 2012 study showed that 78 per cent of the migrant labourers surveyed possessed voter ID cards and had names on voters lists in their home cities. Economic constraints disable a majority of them from voting as they cannot, in the midst of harsh work cycles, commute to their home states on the polling day. One survey shows that only 48 per cent of those surveyed voted in the 2009 Lok Sabha elections, when the national average was 59.7 per cent. These patterns have stayed consistent. In the 2019 Lok Sabha polls, major sender states such as Bihar and UP had among the lowest voter turnout rates at 57.33 per cent and 59.21 per cent respectively, while the national average was 67.4 per cent.
>
> Given the nature of migration being circular and seasonal, migrants are not permanent/long-term residents in host cities and do not satisfy the requirements of being an "ordinary resident," under Section 20 of the Representation of People Act, (RP Act), in the host state to obtain voter cards. They are, therefore, unable to transfer their constituency. Only 10 per cent of migrant labourers surveyed possessed voter IDs in their host cities. This is where we are at, on the cusp of a political campaign that could, potentially, alter India's political landscape.[11]

CJP has with us an alliance of partners from Bengal, Orissa, UP, and Assam. We urge that all right-thinking Indians lend their voice. Ends.

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[10] Teesta Setalvad, 'The Migrant's Right to Vote' *The Indian Express* (18 July 2020) <https://indianexpress.com/article/opinion/columns/election-comission-right-to-vote-migrant-workers-6511095/>.

[11] '#LetMigrantsVote' (CJP) <https://cjp.org.in/let-migrant-vote/>.

Painful Postscript: On the morning of August 6, we suffered an unspeakable tragedy. Ayesha Tirmizi, life partner of our lawyer in arms from Gujarat, advocate from the High Court, Suhel Tirmizi, who had valiantly fought the 2002 Survivor battles with us, died from being burnt alive in the Shrey Hospital fire that claimed eight lives in its ICU. Ayesha fought COVID valiantly despite co-morbidities and was to be moved out of the ICU on the same day, at 3 a.m., that the fire consumed her life. This Pandemic and Lockdown will forever for me then mean losses that are deeply personal and political.[12]

[12] 'Ayesha Tirmizi was Recovering When Her Life was Cut Short' (*Sabrang*, 7 August 2020) <http://sabrangindia.in/article/ayesha-tirmizi-was-recovering-when-her-life-was-cut-short>.

PLAYSIGHTS

“Things Can Change”: Notes from a Theatrical Response to the Decriminalization of Queer Intimacy in India

Danish Sheikh

"THINGS CAN CHANGE": NOTES FROM A THEATRICAL RESPONSE TO THE DECRIMINALIZATION OF QUEER INTIMACY IN INDIA

Danish Sheikh*

In 2017, I wrote *Contempt,* a theatrical rendition of the Supreme Court hearings leading up to *Suresh Kumar Koushal v. Naz Foundation*.[1] Many queer Indians will remember it as the decision that referred to us as a "miniscule minority", too little in number to merit "so-called rights". I was a member of the litigation team in that round, and the play was an attempt to come to terms with loss and anger and shame.

A minor dissent, then.

On the 6th of September 2018, the Indian Supreme Court read down Section 377 of the Indian Penal Code to decriminalize consensual sex between adults. Effectively, the decision marked the end of the criminalization of the intimate lives of LGBTQ Indians.

How clear this "end" was, how definitive the line between the past and the future might be, what it meant to live with full sexual citizenship: these were some of the questions that I grappled with as a gay man who'd spent more than a decade living in the shadows of this law. They were also questions I traced in the different conversations taking place across civil society and academic spaces after the decision.

My follow-up play, *Pride*, is an attempt to think with these questions. It is also an attempt to come to terms with loss and anger and shame, even as the cause of these feelings is less clearly attributable to a court decision.

The full text of *Pride* will be published by Seagull Books as part of a larger volume called *Love and Reparation*; what follows immediately is a brief extract about midway through the play. The "interludes" are set in the space of a public discussion involving queer activists and lawyers, while the therapy scenes involve a conversation between A, a gay man, and his therapist.

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* PhD Candidate, Melbourne Law School. For this particular extract, I'm grateful to Abhina Aher for generously sharing her stories with me, and for her permission to place them within this narrative. I'm also grateful to Jonathan Rhys Hill, for more than I can readily express in a footnote.

[1] (2014) 1 SCC 1.

Interlude – III

Person 3:

This case is about how things can change.

For me, it's a case about my parents.

I came out to them six years ago, the week before the hearings in *Suresh Kumar Koushal* began. They were angry, they were sad, they were confused, all of these things. When they took me to a psychiatrist, he told us all that my homosexuality was a mental disorder, possibly the result of a tumour in my hypothalamus, which he could cure with aggressive instant treatment. When I pointed out the World Health Organization's clear position on homosexuality not being a disease and threatened to file a complaint against him, he tried to convince my parents I was suffering from a form of schizophrenia.

I stormed out of the doctor's office. I almost stormed out of their lives. Something broke between us that day, and even on the few occasions we would speak, it was always by talking around the issue. My mother and I still made some progress, and Bollywood helped us; every time a movie released with a queer character, we could talk about that as some kind of proxy. My father on the other hand was consistent in his silence around this issue.

When the *Suresh Kumar Koushal* decision came out in 2013, I was studying in the US. It was a particularly snowy winter that year, they were calling it the year of the polar vortex. My father called that day, a few hours after the decision came out. He asked how I was dealing with the cold, he asked whether I was taking adequate precautions to keep myself warm. We spoke politely about the weather for two minutes. There was a pause in the conversation, maybe 3 seconds, it could have been the line dropping but I let myself think it was because he wanted to say one more thing and couldn't bring himself to. The conversation ended there, anyway.

And then something changed, and I don't know what journey he took to get there, but something changed. On the 9th of July 2018 the Supreme Court began to hear its final arguments in the *Navtej Johar* petition. I saw a missed call from him that morning on my phone, and then every morning for the next three days—I was too busy watching the hearings to take the call, but if I'm honest, I was also dreading what he would say, how I would respond.

The fourth morning he called, once again, and this time I answered. His voice shook—my father, the most confident, assertive man I know, this man who at one point managed a staff of hundreds, his voice shook, his voice shook as he asked me if I would like him and my mother to come to the court, if that would help, if I might need their support at this time?

It took me a while to find my voice.

Things can change.

Therapy – IV

A: It's different this time. You can't script these things you know.

T: Don't you do that with your work?

A: I mean, you can't plan them in advance right? What are the chances? What are the odds that—here's the scene, I'm in the audience, watching a play, in London, the first play that I have written, and somehow it’s made its way to London and next to me is this man, this stranger, he's cute, I've checked him out in the hallway outside, and he gets the seat next to me. And when the play starts they do a little shoutout to the playwright, like hey there's our guy, right there, and I wave, and this man this stranger he just leans in and he says—

Person 1: “Oh so now I'll have to say it's brilliant.”

A: and I say “well, only if you want me to kiss you afterwards”. And he says-

Person 1: “Depends on how well you write”.

A: And then for the next hour we're watching the play not acknowledging each other, and it finishes, and he turns towards me and says—

Person 1: “Well that was pretty fucking brilliant wasn't it?”

A: And I ask, “are you telling me this because you want to make out with me or because you were into the play”, to which he replies—

Person 1: “Why don't I give you the full review, while we're making out?”

A: BOOM. Just like that. I could not have scripted it better.

T: And you kissed?

A: Well we had this little Q and A thing afterwards, but then he caught me at the bar and we went out for a smoke, and then we kissed.

T: I thought you don't smoke?

A: Yeah, no he does.

T: How do you feel about that?

A: I mean, it's not ideal.

T: Didn't you tell me once you felt smokers didn't respect their bodies?

A: I feel like I'm being cross-examined.

T: Just going back to what you've said in the past.

A: Literally how cross examination works.

T: Yes, and you said—

A: Okay so my ideal partner wouldn't smoke, but then can we get back to this story about this more than ideal partner?

T: He's your partner now?

A: Well you and I haven't had a session in two months.

T: When did you meet him?

A: (mumbles) Three weeks.

T: Sorry?

A: It's been three weeks alright! It moved quick.

T: Okay so you had the play and then you kissed and—

A: And we kissed again on the tube and we explored the city, we met his friends and they're great, it's little coterie of artists and—oh he's a music composer, I didn't mention that, and then we went for this concert, and we kissed in parks and then I'm at the airport just walking to the check in counter, and he texts just as I'm walking to the counter, again you can't script these things right, and he says

Person 1: That was just not enough time.

A: and I say "Yes, yes it wasn't enough time, would you like some more time?" And then he says—

Person 1: I would do anything for a time-turner.

A: Which is a Harry Potter reference so you know if I'm not already swooning and so I go to the ticketing counter and I ask for a rebooking 2 days later. And I call him and I say, "mischief managed", which is—

T: A harry potter reference, yes—

A: —and I can tell he's just leapt out of the bed in excitement and so we got two more days of kissing and walking and doing sex things and it was amazing and now yes, we are together.

T: How are you feeling?

A: I feel like I'm high? I feel like I'm walking around with this cushion of warmth hugging me, I feel like this is right, just all of it, it's .... This is what I've been looking for.

T: What about the smoking?

A: What about it? That's a tiny detail, are you hearing this story?

T: You feel good.

A: I feel like something, is healing. Something inside me is whole, and fixed. That ball of anxiety that I carry around all the time. It's gone. So I guess I feel complete. This is it. I'm taking a break, spending the summer with him. And I just know … it's going to be different this time.

Interlude – IV

Person 4:

Nothing's going to change. Anyway, 377 was never such a big issue for us no?

I remember they first punished me for wearing girls' clothes when I was 6, I was a very naughty child, and I would keep stealing clothes from my sister, and then when they caught me they would say you write in a book 500 times "I must not wear girls clothes", but even then I don't think I was doing it purposefully or anything but I wrote "I must wear girls clothes", they really got fed up with me you know? And then we first saw a hijra woman when I was with my mother shopping on the road, I was ten and I looked at her, and I wanted to go to her, and my mother suddenly grabbed my hand and said be careful of them, they will take you away. But I wanted them to take me away.

Soon I became good at attempting suicide. Don't look like that—obviously I'm here now and anyway, my point is I was good at attempting, bad at actually doing it. I was terrible okay, I had no sense. It was funny how bad I was.

The first time—I was a very well fed child okay, I must have been twelve and I had seen enough Bollywood films where they hang from the fan so then one day I decided okay enough time to try this, and I managed to reach the fan, picked a very nice yellow dupatta, obviously it had to look good, and then—*dhad!*—the fan only came down, it couldn't support my weight.

Then next time I thought okay let's try the other big Bollywood style—wrist cutting. But—you are supposed to cut your hand like this if you want to die, not like this, how did I know, I am not a science student—I only got enough marks to get into arts—so I made a bad cut, and it was not bleeding properly, just paining a lot, so then I just had to go to the hospital and get stitches for nothing.

Third time was the most embarrassing. I really like Juhu Chowpatty—I was born and brought up in Bombay, I thought *theek hai*, this is a good location to go. But then I started walking inside, and the sand gets really slippery no so you get scared and then there is all this plastic it's not very clean, and then that water is also so salty so when it

goes into your mouth, it's really yuck. I started screaming at this point and some men on the beach came out to save me. They thought they were saving a woman. I think they were disappointed when we got back to the beach. But they didn't abuse me so that was good.

And then I thought *challo*, three times it hasn't happened, try something else now, try to live. And then there was this law—377—there was some activism to do—*kaun sa kanoon sabse battar bol ke thak gaye*[2]—there were NGOs coming up—that was one way for me to be employed. I had to do little bit of sex work in the start but now we are getting more funding so it's fine for me.

Now this law is gone, *theek hai,* we'll do other work. Our NGO will still get money. All these other new issues coming up, and the old ones haven't gone anyway.

Person 3: So do you feel like nothing changed at all?

Person 4: I took an Uber to go to work the day after the decision. The route map was a rainbow. That was new. Then I got out of the Uber and the men on the road outside my office started calling me names, and I clapped my hands at them. Same thing they've done for the last three years, same thing I've done for the last three years. Supreme Court *kya ukhad legi?*

[2] Translation: Which law is the worst, tired of all the saying.

CARTOON SCAPE

Courtroom Sketches from Vizag

Gnanavi Gummadi

COURTROOM SKETCHES FROM VIZAG

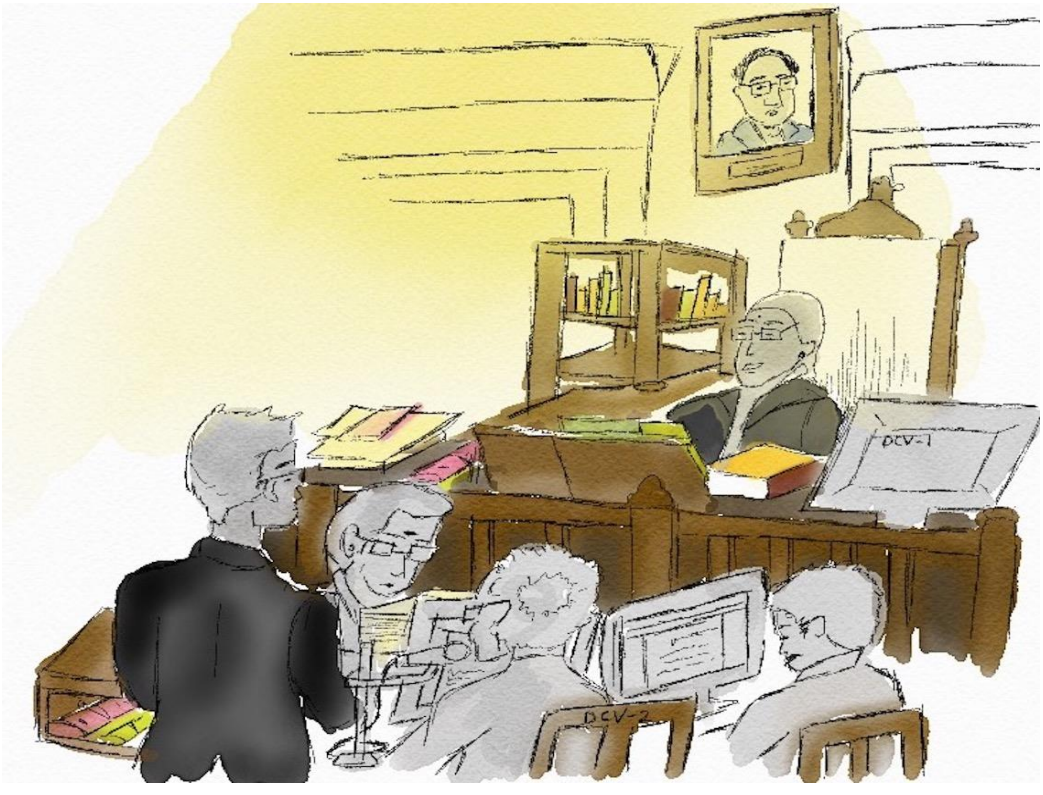
Gnanavi Gummadi*

The courtroom sketches represent the monotony of the courtroom—the fragmented semantics of procedure and the imposing judge-figure. These illustrations also depict the pink and green dockets which occupy every nook and corner of the courtroom-space, signifying the pendency of court cases and peoples' lives on hold.

These sketches inhabit the fault lines between art and law. Law fears and admires art at the same time. Through rational, objective, and textual interpretative methods, law aims to be everything that art is not. Art affectively disrupts the sematic closure that law demands. Art has the power to ignite desire in the viewer without the need to rely on the black-letter words that law enshrines.

The sketches provide a means to understand law without having to learn it. They belong to everyone. They work to stimulate the very emotions that law fears and, in the process, disturb the exclusivity of the legal preserve.

* Currently pursuing a BA/LLB at Jindal Global Law School, Gnanavi Gummadi's medium of choice is painting. She thoroughly enjoys surreal art and is a self-taught artist inspired by her father's hobby of drawing cartoons. Being multilingual, she finds communicating through pictures easier than words. The current set of sketches were drawn during a trial court internship in Visakhapatnam, Andhra Pradesh.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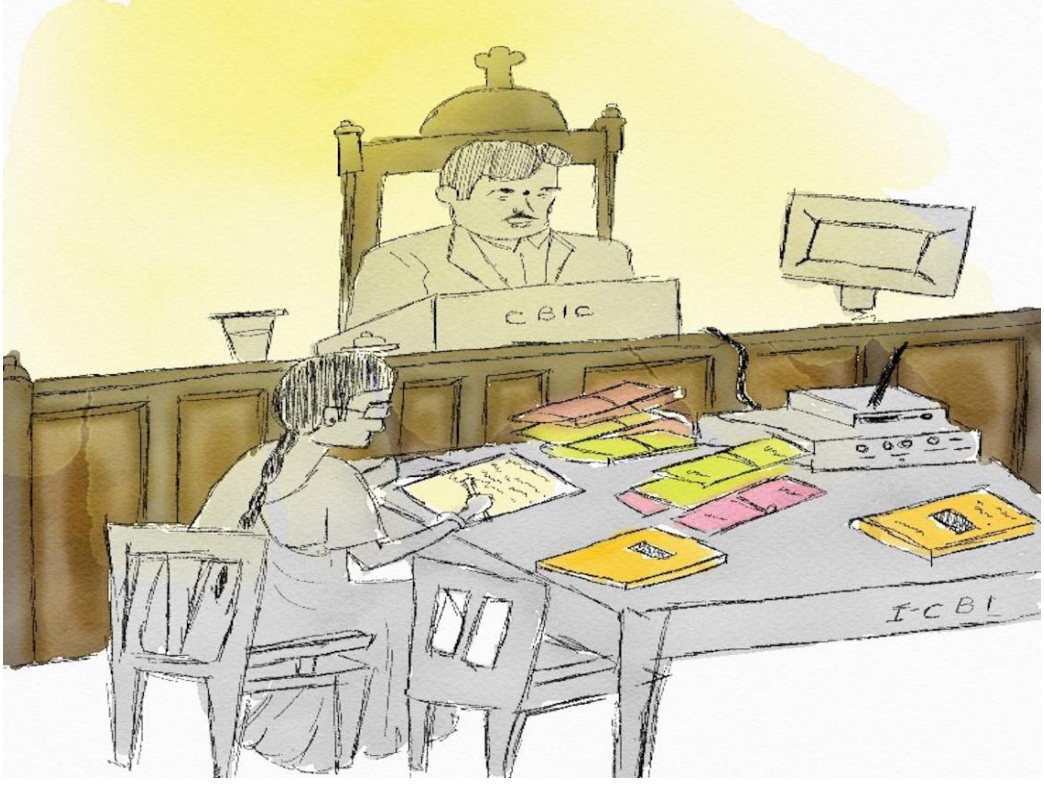
DCV-2


SUPREME COURT
M.C. Vee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